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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 123

MANUAL ENTERPRISES, INC.; TRIM ENTERPRISES, INC.; AND GRECIAN GUILD, PETITIONERS

v.

J. EDWARD DAY, POSTMASTER GENERAL OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Judicial Officer of the Post Office Department (R. 79–88) is not reported. The order of the United States District Court for the District of Columbia (R. 78) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 90–92) is reported at 289 F. 2d 455.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1961 (R. 93). The petition for a writ

of certiorari was filed on May 29, 1961, and granted on October 9, 1961 (R. 94; 368 U.S. 809). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' magazines, whose dominant theme is an appeal to the prurient interest of the average person who reads them, but which do not appeal to the prurient interest of the average adult, are obscene and therefore non-mailable under 18 U.S.C. 1461.

2. Whether respondent's factual finding that petitioners had knowledge that their magazines gave information as to where, how and from whom obscene matter could be obtained was supported by the record.

3. Whether respondent's refusal to carry petitioners' magazines in the mail until a determination was made as to their obscenity, and the procedures followed in making that determination, constituted a previous restraint of speech in violation of the First Amendment.

CONSTITUTIONAL PROVISION, STATUTE AND REGULATIONS INVOLVED

The First Amendment to the Constitution, and the pertinent portions of 18 U.S.C. 1461 and of the Regulations of the Post Office Department (39 C.F.R. 14.4, 14.9, 203.1–.14) are set forth in Appendix A, *infra*, at pp. 80–85).

STATEMENT

Petitioners are District of Columbia corporations engaged in publishing the magazines *MANual, Trim* and *Grecian Guild Pictorial* (R. 66–67; Exs. 1, 2, 3 and 4). Each of the petitioners had the same address,

and each had the same president, Herman Lynn Womack (*ibid.*; R. 71, 84). Each of the magazines has a claimed circulation of 25,000, of which 12,000 are distributed through the mails (although of this number relatively few copies are mailed directly to subscribers, the bulk being mailed in quantity to distributors) (R. 66–67, 71).

1. On March 25, 1960, petitioners deposited at the Post Office at Alexandria, Virginia, six parcels containing 255 copies of the April *MANual* magazine, 75 copies of the March and May issues of *Trim*, and 75 copies of the May issue of *Grecian Guild Pictorial* for transmission as second class mail to an agent in Chicago (R. 80). The magazines deposited consisted almost exclusively of photographs of nude or nearly nude male models, accompanied by a brief caption giving the names of the model and the photographer (R. 90–91; Exs. 1, 2, 3 and 4). Each magazine also contained a directory or index of the names and addresses of photographers whose photographs were included in the magazine, and a few advertisements for nude photographs (R. 91; Exs. 1, 2, 3 and 4). Believing that the magazines might be non-mailable, the Postmaster at Alexandria forwarded the matter to the General Counsel of the Post Office Department. On April 5 and 7, 1960, the General Counsel notified petitioners' president, Mr. Womack, that he had found the magazines non-mailable and that he had made a tentative determination that withholding the magazines from delivery did not involve the amount of money or quantity of magazines necessary for a formal hearing (R. 80, 81). On April 11, 1960,

petitioners challenged the latter finding and requested a hearing on the mailability of the magazines.[1]

On the same day, the Judicial Officer of the Post Office Department found that the matter offered for mailing was of substantial quantity and value and that petitioners were entitled to a formal hearing. He therefore entered an order providing for proceedings pursuant to the Department's Rules of Practice and Proceedings Relative to Mailability (R. 80). The General Counsel filed a complaint on April 14, 1960, alleging that the magazines were obscene and therefore non-mailable because the dominant effect of each of them was to appeal to the prurient interest of the average member of the audience to whom they were directed, and because each of them provided information as to where, how, and from whom obscene pictures could be obtained (R. 80–81). Petitioners responded on April 18, 1960, and hearing was set for April 21, 1960, before a hearing examiner (R. 80–81). In the interest of expediting the proceedings, the parties stipulated, however, that the Judicial Officer of the Post Office Department should preside at the hearing, and that he should enter

[1] On the same date they filed a suit in the district court requesting an injunction requiring the Postmaster General to carry the magazines through the mail. On April 13, 1960, however, a temporary restraining order was denied and the case was remanded by the district court for a final administrative determination as to the mailability of the magazines. On April 25, 1960, the complaint in that action was dismissed without prejudice, with the proviso that petitioners could seek further relief from the court if no final administrative decision had been made by April 28 (R. 81).

final orders without the taking of exceptions (R. 81–82).

2. The record made at the hearing consisted of petitioners' magazines,[2] the expert opinions and testimony of three psychiatrists and two psychologists,[3] and the lay testimony of several postal officials and one disinterested citizen on behalf of the government. Petitioners offered no witnesses who had any personal knowledge of the facts of petitioners' operations.

a. The magazines contained little textual material, with pictures of male models dominating almost every page (R. 37; Exs. 1–4). The typical page consisted of a photograph, with the name of the model and the photographer and occasional references to the model's age (usually under 26), color of eyes, physical dimensions and occupation. The magazines contained little, either in text or pictures, that could be considered as relating in any way to weight lifting, muscle building or physical culture (R. 6–9; Exs. 1–4).

Many of the photographs were of nude male models, usually posed with some object in front of their genitals (Ex. 1, pp. 1, 12, 18, 19; Ex. 2, pp. 17,

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[2] Each of the magazines in issue was received in evidence without objection (R. 4).

[3] Although two psychiatrists studied the magazines for the government and arrived at the same conclusions, only one of them testified, because petitioners stipulated that the testimony of the second psychiatrist would be materially the same as that of the first (Tr. 184). A clinical psychologist also testified for the government. The petitioners' experts were a psychiatrist and a psychotherapist.

24–25, 35, 47; Ex. 3, pp. 13, 22, 37; Ex. 4, pp. 7, 12, 18, 24–25, 37); a number were of nude or partially nude males with emphasis on their bare buttocks (Ex. 1, pp. 24–25, 36, 47; Ex. 2, pp. 7, 11, 14, 42, 43, 46; Ex. 3, pp. 4, 19, 26, 29; Ex. 4, pp. 12, 16). Although none of the pictures directly exposed the model's genitals, some showed his pubic hair and others suggested what appeared to be a semi-erect penis (Ex. 1, pp. 2, 3, 30, 31, 32, 38, 39; Ex. 2, pp. 21, 31, 40, 44; Ex. 3, pp. 7, 11, 14, 23, 28, 32, 38; Ex. 4, pp. 16, 23, 30, 32, 33, 39, 44); others showed male models reclining with their legs (and sometimes their arms as well) spread wide apart (Ex. 1, pp. 23, 28, 30; Ex. 2, p. 12; Ex. 3, pp. 12, 22; Ex. 4, pp. 12, 20, 36). Many of the pictures showed models wearing only loin cloths, "V gowns", or posing straps (Ex. 1, pp. 20, 22, 29, 35, 40–41; Ex. 2, pp. 1, 2, 3, 4, 5, 9, 10, 26, 27, 28, 38; Ex. 3, pp. 10, 18, 30, 39; Ex. 4, pp. 2, 6, 22, 41, 42); some showed the model apparently removing his clothing (Ex. 1, p. 17, Ex. 2, pp. 13, 18, 19; Ex. 3, p. 36; Ex. 4, p. 46). Two of the magazines had pictures of pairs of models posed together suggestively (Ex. 2, pp. 40, 42, 43; Ex. 4, pp. 13, 45, 48).

Each of the magazines contained photographs of models with swords or other long pointed objects (Ex. 1, pp. 26, 27, 30, 37; Ex. 2, pp. 15, 32, 33; Ex. 3, pp. 9, 16, 24–25; Ex. 4, pp. 17, 29). The magazines also contained photographs of virtually nude models wearing only shoes, boots, helmets or leather jackets (Ex. 1, pp. 23, 28; Ex. 2, p. 46; Ex. 3, pp. 5, 16, 23; Ex. 4, p. 12). There were also pic-

tures of models posed with chains or of one model beating another while a third held his face in his hands as if weeping (Ex. 2, pp. 34, 35, 45; Ex. 3, p. 8; Ex. 4, p. 40).

Each of the magazines also contained a directory of the names and addresses of studios and photographers having photographs for sale (Ex. 1, p. 44; Ex. 2, p. 44; Ex. 3, p. 41; Ex. 4, p. 44). Each directory contained a recommendation by the magazine that its readers support the photographers by buying their photographs, and the *MANual* and *Trim* directories expressly stated that the publishers were familiar with the work of the photographers (*ibid.*).[4] In addition to the directories, the magazines contained advertisements for photographs (Ex. 1, pp. 43, 45; Ex. 2, pp. 37, 40–41, 45, 46; Ex. 3, pp. 36, 40; Ex. 4, pp. 37, 40, 45). While many of the advertisements did not specify exactly what the photographs would depict, many had samples of nude or semi-nude male models, while others employed such phrases as "Male Order," "Fantastic and Fabulous," or "perfectly proportioned, handsome, male models, age 18–26" (*e.g.*, Ex. 2, p. 40). None of the advertisements was for athletic, weight-lifting, or body-building equipment or literature.

b. The government's expert witnesses[5] testified, on the basis of their general professional knowledge and

[4] The *Grecian Guild Pictorial* contained a notice that it "does not knowingly use the work of any studio which takes or sells nude or undraped front or side view photographs. The photographers listed above do not offer such photographs" (Ex. 3, p. 41). See pp. 46–51, *infra*.

[5] See note 3, *supra*, p. 5.

training and of their experience in treating patients who were homosexuals or had homosexual tendencies, that the primary appeal of petitioners' magazines would be to overt, practicing homosexuals and to adolescent males with some latent homosexual tendencies (R. 5, 7–8, 10–11, 18, 19, 33–34, 36, 41), and that the normal adult who read such magazines would be the exception (R. 27). These witnesses testified that the magazines were calculated to and would in fact arouse and excite the prurient sexual interest of the persons to whom they would appeal (R. 5, 6, 9, 20). They testified that the magazines would stimulate practicing homosexuals to engage in overt and unlawful homosexual activities (R. 20, 34), that the magazines would have a tendency to induce adolescents with latent homosexual tendencies to engage in overt homosexual activities and become fixed in a pattern of homosexual acts (R. 10–11, 20, 23, 35), and that the excitement the magazines would arouse in both of these classes of persons would make it more difficult to treat and cure them (R. 16, 20).

Focusing upon particular pictures, the expert witnesses testified that emphasis on the male genitals, whether achieved by showing a semi-erect penis or pubic hair (R. 5, 6, 17–18), posing the model in suggestive attire such as a "V gown" or posing strap (R. 5, 6, 8, 9), placing an object in front of the genitals (R. 6), or otherwise, had a special appeal for male homosexuals (R. 6, 8, 9, 18, 23, 32–33, 39). They testified that emphasis on the naked buttocks would especially stimulate homosexually inclined males because of its suggestion of rectal intercourse (R. 7, 8,

9, 14–15). They also testified that photographs of models in "invitation" poses (*i.e.*, with legs spread apart) or undressing would be calculated to arouse the male homosexual (R. 8, 12–13, 29).

The experts testified that pictures in which virtually nude models were posed with swords or other essentially phallic symbols (R. 13–15, 15–16, 38) or wearing only shoes, a jacket or a helmet (R. 7, 13, 15) appealed to common fetishes among male homosexuals. They also testified that pictures in which models were posed with swords or chains or which depicted the administration of beatings would appeal to other deviants within the homosexual group, such as masochists and sadists (R. 12–13, 38).

The experts testified that the arrangements of the several pictures, either by contrasts in costume or by a "build-up" or climactic sequence, contributed to the effects of the magazines upon homosexuals (R. 6–7, 36–37). They concluded that the dominant theme—indeed, "the only theme" (R. 41)—of the magazines was an appeal to the prurient sexual interests of overt homosexual males or adolescent males with homosexual components (R. 9, 18, 41), and that the appeal would have the effects already discussed. There was also expert testimony that the appeals to prurience went substantially beyond the customary bounds of candor and that the magazines were without literary, scientific or educational value (R. 34).

Petitioners offered the testimony of two expert witnesses, which did not materially contradict the expert testimony described above. Petitioners' experts testi-

fied, in substance, that the magazines did not appeal to the prurient interest of the average normal adult person, and that such a person would not be interested in the publications and would not be likely to buy them (R. 42–43, 47–48, 52). One of them testified that the readers of the magazine would principally be "youngsters" (R. 45). They also testified that a child who looked at the magazine would not as a result become a homosexual, and that mere exposure to magazines of this kind would not turn an adolescent into a homosexual (R. 43, 52).

c. In addition to the magazines themselves and the expert testimony, the government offered evidence showing that the president of each of petitioners, Mr. Womack, knew and had admitted that his magazines were being bought and read primarily by homosexuals (R. 54, 57, 59, 64), and that he intentionally appealed to their sexual instincts by selecting photographs on the basis of the model's "sex appeal" and "pretty faces" (R. 88–89). In a letter to one of his photographers to indicate the kind of photographs he wished to use in his magazines, he stated, "In 1958, physique fans want their 'truck driver types' already cleaned up, showered, and ready for bed" (R. 89; Tr. 291–292). At the hearing, petitioners' counsel apparently conceded that these magazines "admittedly are being beamed at homosexuals" (R. 28). Petitioners offered no factual testimony as to the intent or purpose of the magazines or the audience at which they were directed.

d. Testimony of postal inspectors showed that the inspectors had, under assumed names, written to sev-

eral of the photographers listed in the directories of each magazine. They received pictures of nude men and boys displaying their genitals (Tr. 282, 285–88, 291, 323–29; Exs. C. F. K. L). A private citizen appeared as a witness and testified that he had received photographs of nude men, diplaying their genitals, from one of the photographers listed in the directories (Tr. 338–45; Ex. Q). The postal inspector testified that the practice of dealers selling such photographs was to send borderline material in the earlier purchases, but that if one continued to purchase such material, he could obtain "extremely pornographic" material or "hard core" pornographic pictures (R. 57). Such photographs were obtained from dealers (Bob Anthony, Togot, and Take One Studios) listed in petitioners' magazines in police raids on their studios, including photographs of males engaged in unlawful overt homosexual acts (Tr. 334–38; Exs. M, N and O). The record also revealed that Mr. Womack had recently been convicted for sending obscene photographs of nude male models through the mails (R. 56).[6]

3. On April 28, 1960, the Judicial Officer of the Post Office Department rendered a careful and detailed opinion, holding the magazines non-mailable, both because they were obscene and because they contained information as to where, how, and from whom obscene matter could be obtained (R. 79–88). He

[6] *Womack* v. *United States*, 294 F. 2d 204 (C.A. D.C.), certiorari denied, 365 U.S. 859. Mr. Womack has pleaded not guilty by reason of insanity to more recent charges of sending obscene matter through the mail. See Washington Post, February 1, 1962, p. D3.

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found that the publisher of the magazines planned them to appeal to male homosexuals, and that the average readers of the magazines were not ordinary male adults, but male homosexuals and some adolescent males (R. 85, 86). He found that, considered as a whole, the dominant theme and effect of each of the magazines was an appeal to the prurient sexual interest of the average reader of the magazines (R. 87). He therefore concluded that the magazines were "obscene, lewd, lascivious and indecent" and therefore non-mailable under 18 U.S.C. 1461 (R. 87).

In addition he found that the advertisements and indices in the magazines contained information as to where obscene photographs of nude males and "hard-core" pornographic materials could be obtained (R. 86–87). He expressly rejected petitioners' proposed finding that they had no knowledge that obscene materials could be obtained from the photographers listed in the directories in their magazines (R. 87; App. B, *infra*, p. 86). He therefore concluded that the magazines were non-mailable under 18 U.S.C. 1461 for the additional reason that they contained "information as to where, how and from whom obscene materials may be obtained" (R. 87).

4. On May 13, 1960, petitioners brought this action against the respondent in the district court, alleging that the magazines were not obscene and were entitled to the protection of the First Amendment, although conceding that "[t]he preponderance of the expert testimony showed that the magazines in question * * * would appeal to the prurient interest of the homosexuals" (R. 68). The case was submitted

to the district court upon the administrative record and upon cross-motions for summary judgment (R. 71–72, 74–78). The district court held that the respondent was entitled to judgment as a matter of law, and entered an order (without opinion) granting respondent's motion and dismissing the complaint (R. 78).

The court of appeals unanimously affirmed (R. 90–92).[7] The court (per Bastian, J.) expressly rejected petitioners' contention that the magazines were not obscene within the meaning of *Roth* v. *United States*, 354 U.S. 476, because they did not appeal to the prurient interest of the average adult. In the court's view (R. 92):

> [T]he real meaning of *Roth* is that the object in question is not to be considered in terms of the reaction of an isolated atypical consumer. A case of obscenity thus is not to be predicated on the reaction of the peculiarly prudish or susceptible, and neither is a defense to such a charge to be predicated on the lack of reaction on the part of the peculiarly jaded. * * * The proper test in this case, we think, is the reaction of the average member of the class for which the magazines were intended, homosexuals. The testimony of record was clearly to the effect that these magazines would arouse prurient interest in the average homosexual. * * *

The court also held that there was substantial evidence for the conclusion that the magazines were non-mailable because they provided information as

[7] Judge Fahy concurred in the result (R. 92).

to where and how obscene matter could be obtained (R. 92).

SUMMARY OF ARGUMENT

I

A. The determination of whether material is obscene or not should be made in terms of its effect upon the audience to which it is directed and by which it is purchased. The magazines held to be non-mailable in this case were primarily intended for and purchased by male homosexuals, and adolescents with some latent homosexual tendencies. Respondent and the courts below properly determined the obscenity of the magazines in terms of their appeal to the prurient interest of the average purchaser, in this case the male homosexual, rather than (as petitioners urge) in terms of their appeal to the prurient interest of the average normal adult, who would have no interest in the magazines and would be unlikely to buy or read them.

A standard keyed solely to the average normal adult would conflict with the congressional purpose in enacting the legislation in issue here (18 U.S.C. 1461). That statute was designed to prevent the postal system from becoming a vehicle for the cheap dissemination of materials which, either through immediate stimulation or a gradual erosion of accepted moral standards, induce unlawful and immoral sexual conduct. Petitioners' standard would leave those who commercially exploit the prurient interest of adolescents, and of homosexuals, sadists or other persons with deviant sexual impulses, free to sell their pornography without restraint from the federal or state governments, so long as their material does not appeal to the

prurient interest of the average normal adult. Since pornography is likely to have a greater impact upon adolescents and sexual deviants and is more likely to result in unlawful conduct in such cases, petitioners' suggested standard for determining obscenity would free the most pernicious pornography, while permitting the restraint only of that which is aimed at normal adults who are least likely to be adversely affected by it. For these reasons, the serious students of the relationship between law and obscenity, including the drafters of the Model Penal Code, agree with the courts below that obscenity should be determined with reference to the average purchaser of the material rather than to a hypothetical "average person in the community."

The determination of obscenity in terms of its appeal to the prurient interest of its intended and actual audience is consistent with *Roth* v. *United States*, 354 U.S. 476. The decisions of the federal courts, both before and after *Roth*, have appraised the obscenity of materials directed to special audiences in terms of their effect upon the average member.

B. The Judicial Officer of the Post Office Department, as well as the two courts below that affirmed his findings, correctly applied the foregoing standard to the facts of this case. The uncontradicted evidence supported the Judicial Officer's finding that petitioners' magazines were intended by their publishers to appeal to male homosexuals. The expert testimony established that male homosexuals and adolescent males with homosexual tendencies were the

actual audience of these magazines and, as petitioners conceded, that the magazines appealed to their prurient interest. Finally, the expert testimony and the magazines themselves permitted of no conclusion other than that this appeal to the prurient interest of homosexual males was the dominant theme of the magazines and that they had no redeeming literary, scientific or other qualities; and the Judicial Officer so found. Petitioners' magazines are, therefore, plainly obscene and nonmailable.

II

Petitioners' magazines were properly found by the Judicial Officer (affirmed by both courts below) to be non-mailable for the additional reason that they contained information as to where and from whom obscene matter could be obtained. Each of them contained advertisements and a directory of photographers from whom pictures of nude male models could be purchased. The Judicial Officer found that photographs so obtained were obscene as appealing to the prurient interest of homosexuals. The record also established that "hard-core" pornographic material could be obtained from some of the photographers listed in petitioners' magazines, and the Judicial Officer so found. Petitioners did not dispute any of these findings.

The Judicial Officer expressly rejected petitioner's contention that they had no knowledge of the kind of materials sold by the listed photographers. Petitioners' president was fully aware of the activities of the photographers listed in the magazines, and the

advertisements in the magazines themselves put petitioners on notice that the advertisers disseminated obscene matter. Furthermore, the record establishes that petitioners did not make good faith efforts to exclude advertisers of obscene matter.

III

A. The procedures followed in this case were those prescribed by Post Office regulations, which provide for a speedy determination of the mailability of each item deposited for mailing of which there is doubt or dispute as to its mailability. The regulations provide for an initial determination by the General Counsel of the Post Office Department, upon referral by any postmaster who doubts the mailability of an item. If the initial determination is that the item is nonmailable, it is held (subject to withdrawal by the mailer) pending administrative determination by an impartial adjudicatory official after a full adversary hearing. The regulations require expeditious treatment and decision of such cases; in this instance the final administrative decision was made only 34 days from the day the magazines were deposited for mailing.

B. The only restraint imposed by these procedures is that required by the statute—namely, the refusal to convey in the mail material believed to be obscene unless and until it is determined not to be obscene. Any other construction of the statute would require the postal authorities to deliver the materials before a determination could be made as to their obscenity and mailability, and thereby assist in the commission of

a crime. The legislative history of the statute shows that it was intended to authorize the postal authorities to exclude obscene materials from the mails and to refuse to convey or deliver them, as well as to punish those who mailed such materials.

Subsequent statutes have reinforced the authority originally granted and have imposed upon respondent and his agents the duty to refuse to convey such materials through the mails or to deliver them. The statute here is, moreover, part of a comprehensive statutory pattern prohibiting the conveyance in the mails or delivery of a large variety of objectionable materials, including explosives and intoxicating liquors, and the power of the postal authorities to remove these materials from the mails pending determination of their mailability has never been questioned. Finally, the refusal of the Post Office Department to deliver materials believed to be obscene until there has been an authoritative ruling on their mailability reflects a consistent administrative practice extending over many years.

C. The statutory directive to the Post Office Department to refuse to carry obscene materials pending a mailability determination does not impose a previous restraint, in violation of the First Amendment. That refusal is not a *previous* restraint because it applies only to materials after they have been published. Moreover, the refusal to carry such material through the mails constitutes, in itself, no effective *restraint,* because it does not impair the publisher's ability to distribute his periodicals through other channels and by other means of transportation. Fewer

than half of petitioners' magazines were normally delivered by mail. In these respects, such restraint as was imposed by the postal authorities' refusal to carry the material in question was substantially less severe than that imposed by the restrictions on the dissemination of obscenity recently upheld by this Court in *Kingsley Books* v. *Brown*, 354 U.S. 436.

Obscenity is not, of course, within the area of speech protected by the First Amendment. However, in order to insure the free flow of non-obscene literature, it is necessary that there be adequate safeguards and standards for determining what is and what is not obscene. The speedy and particularized administrative procedure established for determining the mailability of possibly obscene matter does provide such safeguards. Whatever minor disabilities it imposes in the way of a brief delay are eminently reasonable in relation to the overriding public interest, expressed in the Act of Congress involved here, in preventing the dissemination of obscene material.

The constitutionality of the provision making obscene material non-mailable and authorizing its removal from the mails pending determination as to its mailability has been accepted without challenge for 85 years. It is fully supported by many decisions of this Court and of the lower federal courts. There is no basis for overturning it now.

ARGUMENT

I. PETITIONERS' MAGAZINES WERE PROPERLY FOUND TO BE OBSCENE AND NON-MAILABLE

Petitioners mount a two-fold attack upon the conclusions of respondent and the courts below that the magazines in question were obscene and therefore nonmailable. They challenge the standard for determining obscenity used by respondent and the courts below, focusing as it did upon the effect of the magazines on their average reader, rather than on the average person in the community. Thus, although the average readers of the magazines were homosexuals, and the average normal adult would have no interest in and would not be likely to purchase or read them, petitioners contend that the magazines cannot constitutionally be found to be obscene, since they do not appeal to the prurient interest of the "average, normal adult" (Pet. Brief, pp. 26–30). In the other phase of their attack, petitioners in various ways contest the findings of fact arrived at below to the effect that the dominant theme of the magazines was an appeal to the prurient interest of homosexuals, the persons who were their intended and actual audience. Petitioners contend that "intent" is irrelevant, that "homosexuals" is not a definable class, and that the dominant theme of these magazines was body-building and muscular development (Pet. Brief, pp. 8–30).

In this point of our argument we show first that, where, as in this case, it is clear from the record that the reading matter was especially designed for, directed to, and read by an audience of atypical persons (here, homosexuals), obscenity should be judged in

terms of the average reader, not by the average adult who would have no interest in the magazines and (except out of curiosity) would never have occasion to see them. Secondly, we show that the respondent and the courts below properly applied this standard to the facts of record when they found that homosexuals were the intended and actual readers of these magazines, that the magazines appealed to the prurient interest of these individuals, and that this appeal was the dominant theme of the magazines.

A. THE OBSCENITY OF READING MATTER SHOULD BE JUDGED IN TERMS OF ITS EFFECT UPON THE AVERAGE READER, NOT UPON THE AVERAGE PERSON IN THE COMMUNITY

Any doubt that obscenity is not within the area of constitutionally protected speech or press was laid to rest by this Court's decision in *Roth* v. *United States*, 354 U.S. 476.[8] Petitioners do not argue to the contrary; neither do they argue that the statute involved, 18 U.S.C. 1461 (App. A, *infra*, pp. 80–81), is unconstitutional on its face. Petitioners would, however, have this Court rule that all material which does not appeal to the prurient interest of the average, normal adult is automatically not obscene and therefore protected by the First Amendment—regardless of the

[8] For other areas of speech beyond the protection of the First Amendment, see *Donaldson* v. *Read Magazine*, 333 U.S. 178, 191 (fraudulent representations); *Public Clearing House* v. *Coyne*, 194 U.S. 497 (same); *Beauharnais* v. *Illinois*, 343 U.S. 250, 266 (libelous utterances); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571–572 (disorderly language in public). Although the obscenity question had not been squarely presented in a constitutional setting prior to the *Roth* case, the Court "always assumed that obscenity is not protected by the freedoms of speech and press." 354 U.S. at 481, and cases cited.

fact that it is not read by the average person, no matter how blatant its appeal to the prurient interest of homosexuals or other special audiences, and no matter how probable it is that the material will lead to unlawful and immoral conduct (Pet. Brief, p. 26). This contention is supported neither by reason nor by precedent.

The federal statute which prohibits the carriage in the mails of obscene matter is addressed to the same social problem that has led the States to outlaw the sale or exhibition of such matter.[9] Although the precise scope and character of that problem have frequently been left unarticulated it seems clear that, in adopting 18 U.S.C. 1461, Congress at the very least intended to prevent the postal system from becoming a vehicle for the cheap dissemination of materials which, either immediately or through a gradual erosion of accepted moral standards, would induce unlawful and immoral sexual conduct.[10] As two of

[9] Hearings before the Senate Judiciary Subcommittee to Investigate Juvenile Delinquency, 84th Cong., 1st Sess. (May 24, 1955), pp. 49–52.

[10] Numerous other policy reasons for condemning obscenity have been authoritatively suggested. The late Zechariah Chafee, for example, asserted that obscenity has been universally outlawed primarily to protect individuals against an affront to the sensibilities. Chafee, *Free Speech in the United States*, 529–54. A noted anthropologist, on the other hand, believes that control of obscene matter is one of society's devices for assuring the healthy interest and controlled conduct in sexual affairs which leads to a stable family and enough children to maintain the community. Margaret Mead, "Sex and Censorship in Contemporary Society," in *New World Writing, Third Mentor Selection*, 9–17 (1953).

the Nation's "outstanding authorities on obscenity" [11] have observed:

> The primary evil aimed at by obscenity censorship is the danger that through stimulating sexual desire obscene literature will lead to sexual conduct that is illegal or otherwise inconsistent with current moral standards.[12]

The belief that obscenity and pornography will induce such conduct is represented in the uniform legislative judgment that the commercial exploitation of such material should be outlawed. Although there has been no conclusive scientific demonstration of either its validity or invalidity,[13] that belief is supported by the opinions of leading law enforcement officers,[14] prominent laymen,[15] and in this case by expert psychiatric and psychological testimony (R. 10–11, 19–20, 34–35).

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[11] *Roth* v. *United States*, 354 U.S. 476, 509 (dissenting opinion of Mr. Justice Douglas).

[12] Lockhart and McClure, *Literature, the Law of Obscenity and the Constitution*, 38 Minn. L. Rev. 295, 382–383.

[13] Kronhausen, *Pornography and the Law*, 23, 261–262; Lockhart and McClure, *op. cit., supra* note 12, 38 Minn. L. Rev. at 394; *Roth* v. *Goldman*, 172 F. 2d 788, 792 (C.A. 2) (concurring opinion), certiorari denied, 337 U.S. 938.

[14] *E.g.*, Donald S. Leonard, Chairman, Conference of International Association of Chiefs of Police, quoted in Report of the House Select Committee on Current Pornographic Materials, H. Rep. 2510, 82d Cong., 2d Sess., p. 114; and J. Edgar Hoover, quoted in Harpster, *Jurisprudence, Obscene Literature*, 34 Marq. L. Rev. 301, 302.

[15] *E.g.*, Dr. Joseph M. Dawson, Executive Director, Joint Committee on Public Affairs for the Baptists of the United States, Hearings before the House Post Office and Civil Service Committee on H.R. 569, 83d Cong., 2d Sess., p. 8.

It is of course settled that the obscenity of matter directed to and read by the general public should be judged in reference to its effect upon the average person in the community, and not by its effect upon particularly susceptible persons. *Roth* v. *United States*, 354 U.S. 476, 488–489. Compare *Regina* v. *Hicklin* [1868] L.R. 3 Q.B. 360. Thus, a book directed to the general reading public cannot be held to be obscene because of its potentially deleterious effect upon youth; to do so would be to restrict the reading of the adult population, in matters relating to sex, to literature which is safe for children. *Butler* v. *Michigan*, 352 U.S. 380, 383; see *Volanski* v. *United States*, 246 F. 2d 842 (C.A. 6). see also *United States* v. *Kennerly*, 209 Fed. 119 (S.D.N.Y.) But this Court has not been squarely presented with the problem presented by the case at bar—namely, pornographic material directed to and received by an atypical segment of the population, in this instance male homosexuals and adolescents with latent homosexual tendencies. The same problem is presented in cases involving material directed to and received by other limited segments of the population, such as adolescent children, or adults with sadistic or masochistic sexual tendencies. The Post Office Department's Judicial Officer and the courts below met the problem by considering the magazines with reference to their effect upon the average member of the intended and actual audience, not by their effect upon the average person in the community, who, if he read them at all, would be an atypical reader (R. 86, 92).

The validity of this standard is substantiated by the conclusion of those who have devoted themselves to the study of the relationship between law and obscenity. In their view, where material is directed to a particular group within the community, obscenity should be determined with reference to the average person in the intended and actual group, rather than to the average person in the community. See, *e.g.*, Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 70–88; St. John Stevas, *Obscenity and the Law,* 202–203, and Appendix II, pp. 212, 213 (London, 1956); A.L.I. Model Penal Code, Tentative Draft No. 6, § 207.10(2), and comments at p. 11 (1957). Perhaps most significant in this regard is the statute recently adopted in England as the culmination of a sustained effort on the part of leading literary figures to reform the existing law relating to obscenity. See Williams, *The Obscene Publications Act, 1959,* 23 Mod. L. Rev. 285; and see St. John Stevas, *Obscenity and the Law,* Introduction by A. P. Herbert, and pp. XIX–XX, 189–96, 202–03, and Appendix II, 209–16. The Act was intended, *inter alia,* to replace the *Hicklin* test (*Regina* v. *Hicklin, supra*), by which allegedly obscene material is judged by its effect upon the most susceptible persons. H. Comm. Paper 123–I of 1958, paras. 14–17. The new Act provides that the material is to be judged in terms of its effect upon "persons who are likely * * * to read * * * it." Obscene Publications Act, 1959, Secs. 1, 7, and 8 Eliz. 2, c. 66; 39 Halsbury's Stat. of Eng. 268 (2d ed.).

It seems clear that the obscenity standard by which 18 U.S.C. 1461 is applied must be in terms of the effect of the material upon the persons who are intended to, and actually do, see it. If obscenity is always to be measured with reference to the average person in the community, regardless of the intended and actual audience for the material, then there is no way of dealing with those who would commercially exploit the adolescent interest in sexual matters by selling to teenagers pornography expressly designed to appeal to their prurient interest, so long as it does not excite the average mature adult. If the standard for measuring obscenity is inflexibly geared to the interests and reactions of the normal adult, then those who gain their livelihood by pandering to the warped interests of perverts and other sexual deviants would find their activities constitutionally protected; under petitioner's standard, "hard-core" pornography consisting of photographs of males engaged in abnormal and unlawful sexual acts (*e.g.*, Exs. M and N) could not be outlawed as obscene, because, although openly appealing to the prurient interest of homosexuals, it would only affront the average normal adult.[16]

The absurdity of a standard keyed only to the average adult becomes even more apparent when it is considered that the statute restricting traffic in obscenity was intended primarily to prevent such mat-

[16] Indeed, there is authority for the proposition that even heterosexual pornography does not appeal to the prurient interest of the average adult, but appeals only to the cravings of the sexually immature for erotic fantasy. Lockhart and McClure, *Censorship of Obscenity, The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 72–73; see also *id.* at 62–65.

ter from inducing the readers—whether they are "normal," "adult," or otherwise—to engage in unlawful sexual activities. See pp. 22 *ff.*, *supra*. There was uncontradicted psychiatric testimony in this case, based upon experience gained in the treatment of homosexual patients, that the magazine in issue here, and the photographs obtainable from their advertisers, appealed to and stimulated the sexual appetites of the intended and actual consumers—both latent and practicing homosexuals—and thereby tended to induce them to engage in perverted acts (R. 10–11, 19–20, 34–35). The record indicates that pornographic material directed to sexual deviates is more likely to induce overt sexual activity than such material directed to the normal sexual impulses (R. 34–35; see also Hearings before the House Post Office and Civil Service Committee on H.R. 569, 83d Cong., 2d Sess., p. 22). And since overt homosexual acts are uniformly outlawed, pornographic material directed to a sexually abnormal audience is even more likely to induce unlawful conduct than pornographic material appealing to normal persons. Yet under the standard advocated by petitioners, such materials would be beyond control, while matter which appeals to the prurient sexual interest of the average person (who in most instances has a lawful outlet for his sexual drive) can constitutionally be condemned. Under that criterion, too, materials which were designed for and read by children under sixteen, and which appealed to their prurient interest, would be constitutionally protected, although they had a tendency

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to induce immoral or unlawful conduct on the part of children.[17] In short, under petitioners' criterion the federal and state legislatures could not prohibit the commercial exploitation of the prurient interest of those groups in society whose conduct is most likely to be adversely affected by pornography, but they can prohibit similar exploitation of the prurient interest of the average adult, who is least likely to be affected. The statute will not support, nor can the Constitution be thought to require, such an anomalous result.

Certainly no such result is required by this Court's decision in *Roth* v. *United States*, 354 U.S. 476, where the Court upheld the constitutionality of 18 U.S.C. 1461. The order granting certiorari limited the Court's review to that question, and excluded from consideration any problems concerning the determination of the obscenity of the particular materials there involved (352 U.S. 964; see Petition for Certiorari, No. 582, O.T. 1956, pp. 2–3). In discussing the scope of the constitutionally unprotected area of obscenity, the Court defined obscenity in the following terms (354 U.S. at 487):

> Obscene material is material which deals with sex in a manner appealing to prurient interest[20]
>
> * * *
>
> [20] *I.e.*, material having a tendency to excite lustful thoughts. * * * [the Court's footnote].

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[17] Compare Note, "*For Adults Only*": *The Constitutionality of Government Film Censorship by Age Classification*, 69 Yale L.J. 141.

The Court went on to approve, as constitutionally sound, the standard for determining obscenity that had been adopted in the more recent decisions of American courts (354 U.S. at 488–89):

> The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. *Regina* v. *Hicklin,* [1868] L.R. 3 Q.B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, *might well encompass material legitimately treating with sex,* and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity. [Emphasis added; footnotes omitted.]

The language just quoted does not support petitioners' view that obscenity must invariably be judged in accordance with its effect upon the average person. The rule in the *Hicklin* case was disapproved because that rule, by focusing on the effect of isolated passages upon the most susceptible persons, might condemn "material legitimately treating with sex". The reference to the "average person" was in contrast to "particularly susceptible persons" as used in the *Hicklin* rule. Nothing in the *Roth* opinion indicates

that the Court intended to lay down an inflexible and universal rule that obscenity must always be judged in terms of its effect upon the average person, regardless of the intended and actual audience.

Rather, we think, the Court's approval of the *Roth* charge to the jury, and its citations of authority, show that the reference to the "average person" was to the average person likely to read the material, so that the intended and actual audience for the publication should be considered in determining obscenity. Thus, the district court in the *Roth* case charged the jury that the test is the effect of the material "upon all those whom it is likely to reach."[18] 354 U.S. at 490. And perhaps of more significance are some of the cases cited by the Court (354 U.S. at 489, n. 26) as setting forth the modern and approved standard for determining obscenity. Those cases phrased the test in terms of the effect of the material upon the actual or probable audience: "upon all those whom it is likely to reach" (*Parmelee* v. *United States*, 113 F. 2d 729, 731 (C.A. D.C.)); or upon "the reader to whom it is sent" (*United States* v. *Levine*, 83 F. 2d 156, 158 (C.A. 2)), accord: *United States* v. *Dennett*, 39 F. 2d 564, 568 (C.A. 2) (matter held not obscene if distributed to adults, although possibly obscene if distributed to children); *Walker* v. *Popenoe*, 149 F. 2d 511, 512 (C.A. D.C.) ("[t]he effect of a publication on the ordinary reader is what counts"); *Khan* v. *Leo Feist*, 70 F. Supp. 450, 458 (S.D. N.Y.), affirmed, 165

[18] In *Roth*, the books were directed to the general reading public, and the district court quite properly equated the audience with the average person in the community.

F. 2d 188 (C.A. 2) ("hearers" or "intended auditors"). The Court also (354 U.S. at 487, n. 20) cited the Model Penal Code of the American Law Institute, which defines obscenity in terms of its actual audience (see p. 25, *supra*.).

In addition to the decisions cited with approval by the Court in the *Roth* case, there had been many other instances in which material was held to be obscene because of the audience to which it was directed. See *e.g.*, *United States* v. *Rebhuhn*, 109 F. 2d 512, 514–515 (C.A. 2), certiorari denied, 310 U.S. 629 (per L. Hand, J.); see also, *United States* v. *Levine*, 83 F. 2d 156, 158 (C.A. 2); *Burnstein* v. *United States*, 178 F. 2d 665 (C.A. 9). Since the *Roth* decision, three federal appellate rulings (in addition to the decision below) have held that the obscenity of materials must be determined by their effect on the intended and actual audience, so that materials directed toward homosexuals or other deviant groups are obscene if their dominant theme is an appeal to the prurient interest of the average member of the audience. *Womack* v. *United States*, 294 F. 2d 204 (C.A.D.C.), certiorari denied, 365 U.S. 859; *Collier* v. *United States*, 283 F. 2d 780 (C.A. 4), certiorari denied, 365 U.S. 833; *Klaw* v. *Schaffer*, 251 F. 2d 615 (C.A. 2), affirming, on opinion below, 151 F. Supp. 534 (S.D.N.Y.), judgment vacated with orders to dismiss the complaint as abated, 357 U.S. 346. See also *United States* v. *Oakley*, 290 F. 2d 517, 519 (C.A. 6).

In *Womack* v. *United States*, *supra*, the court below affirmed the conviction of Herman Lynn Womack, president and publisher of all three petitioners, under

18 U.S.C. 1461, for sending through the mails obscene photographs of nude males and information as to where such photographs could be obtained. The Court noted that the audience for the photographs was made up of homosexual males, and that the photographs were obscene as appealing to the morbid interest in nudity, beyond the customary limits of candor. In *Collier* v. *United States, supra,* the Court of Appeals for the Fourth Circuit affirmed a conviction for the same kind of offense involving the same kind of subject matter.

In *Klaw* v. *Schaffer, supra,* the Court of Appeals for the Second Circuit upheld a ruling by the Post Office Department, under 39 U.S.C. 259a, that an individual was conducting an enterprise for obtaining money through the mails for obscene matter. The matter consisted of "pin-up" pictures, photographs and motion pictures of scantily clad women, bound, gagged and fettered, or wearing tightly laced or strapped girdles, boots, belts, straitjackets or other constricting clothing. The expert testimony before the hearing examiner was that the materials appealed to the prurient interest of certain sexual deviates with sadistic or masochistic tendencies. 151 F. Supp. at 537–38. The Court of Appeals for the Second Circuit, in an opinion following and citing this Court's decision in *Roth*, approved and adopted the opinion of the district court which held that material directed at and appealing to the prurient interest of sexual deviates

is obscene. 251 F. 2d 615, affirming 151 F. Supp. 534, 538–539.[19]

On the other side of the coin, there were other decisions before the *Roth* case in which matter was held *not* to be obscene because of the character of the audience to which it was directed. See, *e.g.*, *Consumer's Union of U.S.* v. *Walker*, 145 F. 2d 33 (C.A. D.C.); *United States* v. *Nicholas*, 97 F. 2d 510 (C.A. 2). See also, *United States* v. *Dennett*, 39 F. 2d 564 (C.A. 2). To the same effect is a recent district court decision, which strikingly illustrates the invalidity of petitioners' suggested standard that obscenity be judged on the basis of its appeal to the average person. *United States* v. *31 Photographs*, 156 F. Supp. 350 (S.D.N.Y.), involved erotic photographs, concededly appealing to the prurient interest of the average person, which the Kinsey Institute had imported for scientific investigation. The district court ruled—properly, we think—that the materials must be judged in terms of their effect upon the average person who will have access to them; and that, since there was no reasonable probability that the materials would appeal to the prurient interest of the scientists who were to receive them, they should not be considered to be obscene. 156 F. Supp. at 354.

Petitioners cannot draw comfort from this Court's decisions in *Alberts* v. *California*, 354 U.S. 476, and *Kingsley Books* v. *Brown*, 354 U.S. 436, handed

[19] The district court held alternatively that the material also appealed to the prurient interest of the average person.

down the same day as the *Roth* decision. In *Alberts* (which was treated in the same opinion with *Roth*), the pornographic materials consisted of photographs, commonly known as bondage or torture pictures, and other materials designed for persons with sadistic or masochistic sexual impulses. See the record in *Alberts* v. *California*, No. 61, O.T. 1956, pp. 27–28, 39–40, 55, 91. Although the point apparently was not argued, this Court's upholding of the criminal conviction based upon possession of such material for sale would seem to indicate that obscenity includes pornographic material directed solely to atypical groups within society, as well as material directed to the adult with normal sexual impulses. Similarly, by affirming the state court decisions in *Kingsley Books* v. *Brown*, *supra*, the Court upheld an injunction against the distribution of pornography which was, at least in large part, directed to persons with sadistic, masochistic and otherwise perverted sexual impulses.[20] Although the point was not argued in either case, it is reasonable to assume that had this Court intended to exclude from the area of obscenity materials directed solely to the prurient interests of atypical segments of society, it would have so held in the *Kingsley Books* and *Alberts* cases.

There is no substance to petitioners' charge that, by employing a standard that focuses upon homosexuals as a group, respondent (and impliedly the courts below) acted with "blind prejudice, supersti-

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[20] *Burke* v. *Kingsley Books*, 208 Misc. 150, 158–159, 142 N.Y.S. 2d 735, 742–743, affirmed *sub nom. Brown* v. *Kingsley Books*, 1 N.Y. 2d 177, 134 N.E. 2d 461, affirmed, 354 U.S. 436.

tion, hatred and condemnation of non-conformity" (Pet. Brief, p. 25). The Post Office Department refused to carry petitioners' magazines in the mails because their dominant theme was an appeal to the prurient interest of their purchasers. This standard of obscenity makes no invidious distinction between groups within society;[21] nor has respondent singled out petitioners for treatment differing from that accorded other "merchants in obscenity"[22] who pander to prurient sexual interest.

The vice of petitioners' magazines is not, of course, that they are directed to homosexuals. Their vice, we emphasize, is that they are designed as sexual stimulants for their intended audience, without any legitimate message or purpose, and without "having even the slightest redeeming social importance." *Roth* v. *United States, supra,* 354 U.S. at 484. These considerations distinguish petitioners' magazines from the magazine involved in *One, Inc.* v. *Olesen,* 355 U.S. 371. *One* magazine, like the magazines in this case, was directed to an audience of homosexuals. This is the only similarity between the two cases. The issue of *One* involved in that case was made up prin-

[21] There is, of course, no basis for petitioners' assertion that literature or art may be considered obscene under the standards adopted by respondent and the courts below because the author or artist was a homosexual or that the subject matter concerned homosexuals or their problems (Pet. Brief, p. 25). The standard, unlike that advocated by petitioners, measures obscenity by its intended and actual appeal to the prurient interest of the intended and actual readers, without distinctions based upon the personal proclivities of the publisher, author, subject, or reader.

[22] *Kingsley Books* v. *Brown*, 354 U.S. 436, 444.

cipally of textual material describing the legal and social plight of homosexuals in the United States. The only materials in the magazine alleged to be obscene were one short story concerning a lesbian love affair, and a short poem. *One, Inc.* v. *Olesen*, 241 F. 2d 772 (C.A. 9), reversed, 355 U.S. 371. Even assuming this material to have been obscene in isolation, the Court could well have concluded that the dominant theme of the magazine taken as a whole could not be considered an appeal to the prurient interest.[23]

B. PETITIONERS' MAGAZINES WERE PROPERLY FOUND TO HAVE AS THEIR DOMINANT THEME AN APPEAL TO THE PRURIENT INTEREST OF THEIR INTENDED AND ACTUAL READERS

As we have shown in the foregoing section, the standard to be applied in obscenity cases is whether

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[23] There is nothing in the three remaining *per curiam* decisions of this Court dealing with obscenity during the October Term, 1957, to support the petitioners' contention that the obscenity of material must always be judged with reference to its effect upon the average person, rather than the average reader. *Times Film Corp.* v. *Chicago*, 355 U.S. 35; *Mounce* v. *United States*, 355 U.S. 180; *Sunshine Book Co.* v. *Summerfield*, 355 U.S. 372. In the *Mounce* case, the Solicitor General made a confession of error, agreeing that the court below (in its pre-*Roth* decision) had not followed the standard for determining obscenity approved in *Roth*. Memorandum for the United States in No. 542, O.T. 1957, pp. 6–8. The case was accordingly remanded for consideration in accordance with that decision. In the two other cases, the Court ruled only that, considered as a whole, the materials could not be said to have as their dominant theme an appeal to the prurient interest or to be wholly without redeeming social value. Comment, *Per Curiam Decisions of the Supreme Court: 1957 Term*, 26 U. Chi. L. Rev. 279, 309–13; *Collier* v. *United States*, 283 F. 2d 780, 782 (C.A. 4), certiorari denied, 365 U.S. 833; Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 34.

the material in question has as its dominant theme an appeal to the prurient sexual interest of the persons who make up its audience. We now show that the Judicial Officer of the Post Office Department and the two courts below correctly applied this standard to the facts of this case as they were established on the administrative record. All three found, as the evidence required them to find, that the issues of *MANual, Trim* and *Grecian Guild Pictorial* here involved were intended for and were in fact read primarily by homosexual men, and that their dominant theme was an appeal to the prurient sexual interest of those intended and actual readers.

The Post Office Department's Judicial Officer found that the publisher of petitioners' magazines "deliberately planned these publications so that they would appeal to the male homosexual audience" (R. 86) and that "the readers of these publications consist almost entirely of male homosexuals and possibly a few adolescent males" (R. 85). He further found that each magazine "considered fully as a whole * * * appeals to the prurient interest of the average reader of such magazines" (R. 86), particularly noting the "danger of the possible luring of * * * an adolescent reader into the abnormal paths of the homosexual" (*ibid.*). He found that "there is no amount of literary, scientific or other material in these issues of the publications which would in any way offset the effect of the main contents" (R. 85) and concluded that the magazines "have as their dominant theme and effect taken as a whole an appeal to [the] prurient interest" of "the average reader for whom they are designed

and published and who are the special audience to whom they are directed, and to whom the magazines are sold and by whom they are read" (R. 87).

Both the district court and the court of appeals upheld these administrative findings as supported by "substantial evidence" (R. 78, 91–92),[24] and the court of appeals also found that the findings were "amply" and "clearly" supported by the record (R. 92). Petitioners have made no "very obvious and exceptional showing of error" warranting a departure from this Court's usual practice of refusing to review the concurrent findings of the administrative tribunal and the two courts below. See *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275; see also *Great A. & P. Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147; *The Germanic*, 196 U.S. 589. In any event, a summary examination of the administrative record will demonstrate that it admits of no other conclusion than that arrived at by the Judicial Officer and approved by the courts below.

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[24] Since the standards of review in these cases is set forth in the Administrative Procedure Act (5 U.S.C. 1009), we believe that the courts below were correct in applying the "substantial evidence" test. We do not discuss the standard of review, however, because the question has not been raised by the petitioners in the petition or in their brief. U.S. Sup. Ct. Rule 15–1(c)(1), and see *Roth* v. *United States*, 354 U.S. 476, 490 n. 27. A discussion of the standard of review in this case would, at any rate, be academic, because the pertinent testimony was uncontradicted and the findings of basic fact are supported not only by substantial evidence but by virtually all of the evidence in the record. We do not, of course, question this Court's authority to reexamine the evidentiary basis for the conclusions reached on the constitutional issues. *Niemotko* v. *Maryland*, 340 U.S. 268.

The evidence showing that the magazines were designed and intended to appeal to the prurient interest of male homosexuals was uncontradicted. Three witnesses testified that the publisher of the magazines, Mr. Womack, had admitted that they were designed for and read by an audience of male homosexuals (R. 54, 57, 59, 63, 64; see also Exs. S and T); and petitioners' counsel apparently conceded at the hearings that the magazines "admittedly are being beamed at homosexuals" (R. 28). In his business correspondence, Mr. Womack observed that the audience to which his magazines were "oriented" wished to have "their 'truck driver types' already cleaned up, showered, and ready for bed" (Ex. G, R. 89); he advised a photographer who furnished him with photographs for his magazines that the models were selected on the basis of their appeal to the intended audience, and that "it is absolutely essential that the models have pretty faces and a personality not totally unrelated to sex appeal" (*ibid.*).

Moreover, the calculated purpose of the magazines is fairly obvious from the publications themselves (Exs. 1–4). The experts testified that the models' poses, the props, the subject matter and the arrangement of the photographs were such as "could only be explained on the basis of appeal to homosexuals" (R. 8) and that "from all the data considered as a whole I would conclude that the intent of the publishers is to arouse prurient interest in the individual" (R. 36; see also, *e.g.*, R. 33). Petitioners offered no evidence to the contrary. They introduced no testimony concerning the intent or design of the magazines or to

the effect that they had any socially redeeming purpose.

There cannot, of course, be any substance to petitioners' contention (Pet. Brief, p. 27) that "the intent of the publisher is irrelevant." The publisher's intent is plainly relevant as a fruitful and reliable source of information concerning the predictable audience. And certainly the intent of the publisher should be taken into account in determining what the dominant theme of the material is, just as the legitimate literary or artistic purpose of the author or publisher is properly taken into account in determining whether the dominant theme of a work is literary or social, rather than pornographic. See, *e.g.*, *United States* v. *One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y.), affirmed, 72 F. 2d 705 (C.A. 2); *United States* v. *Dennett*, 39 F. 2d 564 (C.A. 2); *Consumer's Union of United States* v. *Walker*, 145 F. 2d 33 (C.A.D.C); compare *United States* v. *Rebhuhn*, 109 F. 2d 512 (C.A. 2), certiorari denied, 310 U.S. 629, and *Roth* v. *Goldman*, 172 F. 2d 788 (C.A. 2), certiorari denied, 337 U.S. 938.

The evidence that the actual audience of the magazines was made up of male homosexuals and some male adolescents, and that the magazine appealed to the prurient interest of these individuals, was essentially uncontradicted. One government expert testified that the magazines "would have a special appeal to * * * male homosexuals who have actually indulged in homosexual practices and who admittedly claimed they are homosexuals, but it also has a[n] appeal to young men, 18 years old, 17 years old who we might classify

as borderline sexual cases" (R. 10; see also R. 5, 7–8, 18, 19), and that for a "normal person" to read them would be "an exception" (R. 27). The testimony of the other government witness was to the same effect (R. 33–34, 36, 41). The government witnesses agreed that it was to the prurient interest of these individuals that the magazines would appeal and that they would stimulate practicing homosexuals to engage in overt homosexual activities and would have a tendency to induce borderline adolescents to become homosexual (see the Statement, pp. 7–9, *supra*).

The testimony of the petitioners' experts was not to the contrary. One of them testified that, while "pictures for the most part have little impact on most homosexuals," they would have impact "on those homosexuals who were frustrated and denied and could not obtain satisfaction" (R. 42); he also testified that "the average normal person" would not "be likely to buy the magazines" (R. 43) and that among those to whom the magazines would appeal would be "the youngster" (R. 45). This witness testified that "a child" would not "become a homosexual" by looking at these magazines (R. 43); and the other expert for the petitioners testified that a "young man * * * not predisposed to becoming a homosexual" would not change his "entire sexual orientation" and become a homosexual by viewing the pictures in these magazines (R. 51–52). Petitioners conceded in their complaint (R. 68) that "[t]he preponderance of the expert testimony showed that the magazines in question * * * would appeal to the prurient interest of homo-

sexuals"; and they submitted to the Judicial Officer as a proposed finding of fact "That all of the magazines in evidence * * * could and would appeal to the prurient interest of particularly susceptible persons such as homosexuals" (App. B, *infra*, p. 86).

Petitioners now attempt to contest the well-supported findings as to the intended and actual audience of the magazines by suggesting that the term "homosexual" is not definable (Pet. Brief, pp. 15–25, particularly p. 16).[25] However, the authorities relied on by petitioners accept and employ the term "homosexual," thus indicating that it has meaning and significance for them (Pet. Brief, pp. 16, 18, 20–21). And in the proceedings before the Judicial Officer, the experts on both sides used the term without objection or qualification (see, *e.g.*, R. 5, 34, 41, 52), and there was testimony that the publisher of petitioners' magazines had employed the term (R. 64). Indeed, as we have indicated, petitioners proposed a finding of fact (accepted by the Judicial Officer, R. 87) based on the term "homosexual" (App. B, *infra*, p. 86). Furthermore, the government's experts made relevant distinctions among the sub-groups within the general category of "homosexuals." Not only did they distinguish in their testimony among overt, practicing homosexuals (*e.g.*, R. 10), adolescents with latent homosexual tendencies (*e.g.*, *ibid.*) and homosexual deviants with sadistic or masochistic tendencies (*e.g.*, R. 12–13),

[25] Even if there were any merit to this contention, it would come too late, for it was not raised at the administrative level, in either court below, or in the petition for certiorari. See *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37; *Hormel* v. *Helvering*, 312 U.S. 552, 556.

but they distinguished among the effects that the magazines would have on these different sub-groups (R. 10–11, 16, 19–20, 23, 34–35).

Finally, the evidence of record compelled the Judicial Officer to conclude that this appeal to the prurient interest of homosexuals was the dominant theme of the magazines and that they had no redeeming qualities. The government experts testified to the overwhelming extent to which material calculated to excite such interest predominated in these publications (R. 5, 9, 18, 34, 41), a conclusion that can be readily substantiated by an examination of the magazines themselves (Exs. 1–4). The government experts also testified as to the lack of any redeeming literary, scientific, educational or other values in the magazines (R. 8–9, 34). Petitioners suggest (Pet. Brief, pp. 9–15) that the dominant theme of the magazines is body-building or physical culture. The record will not support such an assertion. Not only is the expert testimony to the contrary, but petitioners introduced no testimony to the effect that physical culture, or any other legitimate subject, was the dominant theme of the magazines.[26] No one connected in any way with the magazines came forward to testify as to what their purpose was or that they were published with any bona fide intent to express ideas or to advocate a position or point of view. Compare *Roth* v. *United States*, 354 U.S. 476, with *Sunshine Book Co.* v. *Summerfield*,

[26] One of petitioners' experts "gathered" that one of the magazines "is primarily * * * a physical culture magazine" in intent (R. 44), although he disclaimed any special knowledge on that subject (*ibid.*).

355 U.S. 372, and *One, Inc.* v. *Oleson*, 355 U.S. 371. The magazines themselves disclose very little in the way of either text or pictures to suggest that body-building was to any significant extent a part of the magazines' appeal, nor do any of the advertisements offer athletic, weight-lifting or body-building equipment or literature.

Petitioners also suggest (somewhat inconsistently with their argument that the magazines were body-building magazines) that the pictures in the magazines should be considered as no more than the homosexual equivalent of pictures of scantily-clad "pin-up" girls (Pet. Brief, p. 27). First, this is based on the faulty premise that magazines consisting of photographs of nude or partially dressed women, designed to appeal to the prurient interest of the average man and having no redeeming social purpose, are entitled to First Amendment protection. There is no basis in the cases for such a contention; see, *e.g.*, *United States* v. *Oakley*, 290 F. 2d 517 (C.A. 6); *Harris* v. *United States*, 239 F. 2d 612 (C.A. 5); *Glanzman* v. *Schaffer*, 252 F. 2d 333 (C.A. 2), affirming 143 F. Supp. 243 (S.D.N.Y.), vacated with orders to dismiss as abated, 357 U.S. 347. See also *Volanski* v. *United States*, 246 F. 2d 842 (C.A. 6) (photographs of partially clad women could not be held to be not obscene as a matter of law). Second, the record in this case indicated that homosexuals are more easily stimulated to overt sexual activities than are normal persons with heterosexual outlooks (see pp. 8, 27, *supra*). Finally, it seems scarcely open to question that society has a legitimate interest (already expressed in the laws of the States) in preventing overt

homosexual activities while refusing to condemn comparable activities when indulged in on a heterosexual basis.

In short, the Judicial Officer and the two courts that affirmed his findings and conclusions were clearly correct in concluding, on considering the expert testimony and the magazines taken as a whole, that the dominant theme of the issues of *MANual, Trim* and *Grecian Guild Pictorial* in question was an appeal to the prurient sexual interest of the atypical persons who were its actual and intended audience.[27] On the basis of this finding, the Judicial Officer properly found petitioners' magazines to be obscene and, therefore, non-mailable (R. 87). There is no warrant for this Court to disturb those findings and conclusions, sustained by both courts below.

II. PETITIONERS' MAGAZINES WERE PROPERLY FOUND NON-MAILABLE AS CONTAINING INFORMATION FOR OBTAINING OBSCENE MATERIAL

In addition to holding the magazines themselves obscene, the Judicial Officer of the Post Office Department and the courts below found the magazines non-mailable because they contained information as to

[27] The magazines in this case are not only obscene under the standard for determining obscenity set forth by this Court in *Roth*, but are also obscene under the stricter definition of obscenity urged by those who believe that obscenity can be restrained only in cases where it presents a clear and present danger of illegal conduct. See *Roth* v. *United States*, 354 U.S. 507, 509–12 (dissenting opinions). For the evidence in the record in this case shows that the magazines have a direct impact upon their readers, stimulating and inducing them to engage in unlawful acts (R. 10–11, 19–20, 34–35; see also R. 86).

where, how, and from whom obscene matter could be obtained (R. 86, 87, 88, 92). This finding constitutes an additional and independent ground for the respondent's refusal to carry petitioners' magazines in the mail. 18 U.S.C. 1461; *Roth* v. *United States,* 354 U.S. 476.

Virtually every page of petitioners' magazines contained a photograph of a male model with the name of the photographer and model, and each magazine contained a directory containing the names and addresses of photographers whose pictures appeared in the magazine (Exs. 1–4). In addition, the magazines contained some formal advertisements for photographs of males, with such descriptions as "perfectly proportioned, handsome, male models, age 18–26" (*e.g.*, Ex. 2, p. 4). Postal inspectors and a private individual who testified at the administrative hearing obtained from photographers listed in the magazines photographs of nude male models displaying their genitals (Tr. 282, 285–88, 291, 323–39, 338–45; Exs. C, F, K, L, Q).

The photographs obtained from the photographers were plainly obscene (see *Collier* v. *United States,* 283 F. 2d 780 (C.A. 4), certiorari denied, 365 U.S. 833; *Womack* v. *United States,* 294 F. 2d 204, certiorari denied, 365 U.S. 859), and petitioners do not appear to contend otherwise (see Pet. Brief, pp. 30–32).[25]

[25] Of course, if petitioners' contention that obscenity must be judged in terms of its effect upon the average adult were accepted (Pet. Brief, p. 26), these photographs presumably could not be considered obscene, because they would not appeal to the prurient interest of the average man, and there was no evidence that they would appeal to the prurient interest of the average woman.

On the basis of the foregoing evidence, the Judicial Officer found that the male homosexual would find in the magazine information as to "the names and addresses where nude male pictures in poses and conditions which would appeal to his prurient interest may be obtained" (R. 86; see also R. 84, 87). This finding was affirmed by the court of appeals (R. 92).

In addition, the Judicial Officer found that the magazines contained information that would "lead to the procurement of so-called 'hard-core' pornographic material" (R. 87, see also R. 84–85)—namely, material consisting in large part of photographs of males engaged in various homosexual acts. Such photographs were seized at the places of business of photographers listed in the directories of petitioners' magazines (Tr. 33438; Exs. M and N; see also Ex. A). Petitioners concede that they were obscene (Pet. Brief, p. 31).[29] And the undisputed evidence was that dealers in photographs of male nudes sell such "hard core" photographs to those who have made repeated purchases of less offensive material (R. 57). The Judicial Officer was plainly justified in inferring that the listed photographers from whom the photographs were seized kept such photographs for sale to buyers who made repeated purchases of their less obscene material, and the court of appeals so held (R. 92).

Although not specifically challenging any of the foregoing, petitioners nevertheless challenge the conclusion (R. 87) that the magazines are non-mailable

[29] Adoption of petitioners' standard of obscenity, however, would require the conclusion that this "hard-core" pornography was not obscene. See note 28, *supra*, p. 46.

under 18 U.S.C. 1461 as "giving information, directly or indirectly, where, or how, or from whom, or by what means" obscene matter may be obtained. They argue, citing *Smith* v. *California*, 361 U.S. 147 (where this Court held that criminal liability could not attach to unknowing possession of obscene material), that they had no knowledge that the materials sold by the photographers listed in the directories were obscene (Pet. Brief, pp. 30–32). However, the record fully supports the Judicial Officer's express refusal[30] to find that petitioners had no knowledge as to the kind of material sold by the photographers listed in their directories.

There is abundant evidence that petitioners' president, Mr. Womack, was well aware of the kind of materials sold by the photographers listed in the magazines. He himself sold obscene photographs of nude men to homosexuals through the mails, under the trade name of Continental Artists (R. 55, 59; see also Ex. C).[31] Although Continental Artists did not advertise as such in the four magazines in issue here, Vulcan Studios was one of the photographers listed (Ex. 4, p. 44), and Mr. Womack, acting as Continental Artists, answered inquiries addressed to Vulcan Studios and sold the photographs requested (R. 59; see also R. 89). The photographs so sold were obscene (see Ex. C). Surely petitioners cannot

[30] His refusal so to find took the form of a rejection of petitioners' proposed finding (R. 87; see App. B, *infra*, p. 86).

[31] His criminal conviction for that offense was sustained in *Womack* v. *United States*, 294 F. 2d 204 (C.A.D.C.), certiorari denied, 365 U.S. 859. See note 6, *supra*, p. 11.

assert a lack of knowledge based on the fact that their president acted in one capacity in selling the photographs and in another capacity in listing himself (as Vulcan Studios) as a vendor of photographs.

In addition, in March and April 1959, approximately a year prior to the publication of these magazines, petitioners' president was warned by the postal authorities that a number of his advertisers were being prosecuted for mailing obscene matter, and that he might be violating the law by transmitting through the mails information as to where obscene material could be obtained (R. 53–54). Even if it is true, as petitioners contend (see R. 58), that Mr. Womack said he would stop carrying the names of any photographer *convicted* of such charges, the warning he received would seem to have put him on notice that sterner measures than that would be required in order for him to satisfy himself that he was not violating the law.

Furthermore, the oral and documentary evidence shows that Mr. Womack (with whose knowledge petitioners, of which he was president, are plainly chargeable) knew that petitioners' magazines were aimed at an audience of male homosexuals and were designed to appeal to and stimulate their erotic interests (Exs. G and P; R. 54, 57, 59, 64, 88–89). In his business correspondence Mr. Womack suggested the exchange of customer names among those in the business of purveying photographs of nude men, with the hope of compiling a master "sucker list" (Ex. P). Under the circumstances, there is no room for the suggestion that Mr. Womack was unaware of what

was being sold by his fellow dealers in materials pandering to the prurient interest of homosexuals.

Even apart from Mr. Womack's knowledge, there is ample evidence that petitioners must have known of the nature of the materials sold by the photographers listed in their directories. Three of the four magazines in issue contained an express representation that the editors were familiar with the work of the photographers listed in the index or directory, and all of them contained an endorsement of the photographers and a recommendation that the readers support the photographers by purchasing their product (Ex. 1, p. 44; Ex. 2, p. 44; Ex. 3, p. 41; Ex. 4, p. 44). Furthermore, the advertisements themselves were sufficient to put petitioners on notice that the advertisers were selling pornography and obscenity. These typically consisted of a photograph of a nude or scantily attired young man and clearly indicated that the photographs to be purchased were of young male models. Moreover, some of them, featuring a photograph of a nude male that had obviously been retouched to cover his genitals, would offer an "original print of this photo" (*e.g.*, Ex. 2, p. 41). As the expert testimony showed, the poses and adjectives employed were plainly designed to tempt the reader with the promise of sexual excitement by means of the photographs being sold (R. 18–19).

The undeniable evidence of petitioners' president's activities in the distribution of obscene material and of the knowledge he clearly had or with which he was properly chargeable, petitioners' representations of knowledge as to the photographers' work, and the

character of the advertisements themselves all lend weighty support to the Judicial Officer's determination that petitioners were aware that the photographers they listed were distributing obscene matter. That determination is further supported by the lack of testimony by Mr. Womack or by anyone else as to petitioners' innocence in this regard.

It is arguable that Congress did not intend that *scienter* on the part of the sender be a prerequisite to a declaration of the non-mailability of matter containing information as to where obscene material may be obtained. The non-mailability provisions of 18 U.S.C. 1461 contain no express requirement of knowledge, while by sharp contrast the criminal provisions of the same section provide that one must have used the mails in the proscribed ways "knowingly" before he may be criminally convicted. However, assuming the statute should be construed as calling for some measure of *scienter,* it must also call for a good-faith effort on the part of the mailer to insure that he is not disseminating information as to where obscenity may be obtained—especially when (as here) he is on notice of the very real possibility that he might be doing so. See *Smith* v. *California, supra,* 361 U.S. at 154. The record falls far short of establishing that petitioners or their president undertook such a good-faith effort. Even in the absence of the convincing evidence of their actual knowledge that photographers whose names and addresses they published were distributing obscene matter (see pp. 45–51, *supra*), petitioners and their president, Mr. Womack, would plainly be chargeable with knowledge of that fact,

which they could have determined upon even the most superficial investigation.

III. THE PROCEDURES FOLLOWED BY RESPONDENT DID NOT CONSTITUTE A PREVIOUS RESTRAINT ABRIDGING FREEDOM OF SPEECH OR OF THE PRESS

Petitioners complain generally of "an unconstitutional prior restraint" (Pet. Brief, pp. 32–35), without specifying whether the asserted vice lies in the particular actions taken by respondent's agents in this case, in the procedure provided by the Post Office Department's regulations for the handling of matter that may be obscene, in the statute itself, or in all three. In this point of our brief, we show that respondent's agents scrupulously followed the procedures established by the Post Office regulations, which provide for a fair and speedy determination of the mailability of each challenged article; that those regulations impose no restraint on distribution not required and authorized by statute; and that the Act of Congress itself does not impose or authorize a previous restraint abridging the freedom of speech or of the press guaranteed by the First Amendment to the Constitution.

A. THE PROCEDURES FOLLOWED IN THIS CASE WERE IN FULL COMPLIANCE WITH APPLICABLE POST OFFICE REGULATIONS

The Regulations of the Post Office Department impose upon the individual postmaster the duty to withhold from dispatch or delivery any matter of doubtful mailability and to send a sample or description of it to the General Counsel of the Post Office Department for instructions (39 C.F.R. 14.9; see App. A, *infra*,

pp. 84–85). The Department's Rules of Practice and Proceedings Relative to Mailability provide for procedures to determine mailability (39 C.F.R. 203; see App. A, *infra*, pp. 81–84).[32] The General Counsel is directed to give his opinion "[u]pon receipt" as to the mailability of the items. If he determines that they are not obscene, he is to issue instructions to the postmaster to proceed with their delivery, but if he believes they are obscene and non-mailable, he is directed to issue a complaint promptly, setting forth the basis for his belief. Upon the filing of the complaint, a hearing before a hearing examiner is scheduled, which must be held within 10 days of the date of the filing of the complaint. The hearing examiner's decision must be rendered within 5 days after the conclusion of the hearing.[33] That decision becomes the departmental decision unless the losing party takes an appeal to the Judicial Officer of the Department within 5 days. The rules encourage the parties to agree by stipulation on time-saving procedures.

Petitioners' magazines were placed in the mails on March 25, 1960. In accordance with these regulations, the postmaster at Alexandria, Virginia, who had doubts as to the mailability of the magazines, withheld them from dispatch and forwarded a sample

[32] These same regulations, which are applicable only "to cases where the matter offered for mailing shall be of substantial value or quantity," govern all proceedings to determine nonmailability, including obscenity. On December 31, 1961, they were modified in some details, 26 Fed. Reg. 12777.

[33] This requirement has recently been modified. See fn. 32, *supra*.

to the General Counsel of the Post Office Department (R. 80). The General Counsel was of the view that the magazines were obscene, and promptly notified petitioners of that fact by letters of April 5 and 7, 1960 (R. 80).[34] Petitioners thereupon requested a formal hearing under the Rules of Practice, and, on April 11, the Judicial Officer entered an order setting in motion the procedures for a formal hearing (*ibid.*).

The General Counsel filed his complaint on April 14, alleging the nonmailability of petitioners' magazines. Petitioners and respondent agreed by stipulation to procedures to expedite consideration and final determination of the mailability of the magazines (R. 81–82); among other things, it was agreed that the hearing should be held before the Judicial Officer in the first instance, rather than before a hearing examiner.[35] The hearing was held on April 21, 22 and 25, 1960 (R. 82). The burden of proof was on government counsel, and petitioners were accorded full rights of confrontation and cross-examination and ample opportunity to present evidence (see, generally, R. 2–65). The Judicial Officer rendered his decision on April 28, 1960, on the third day following the close

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[34] The General Counsel made a tentative determination that the items in dispute were not of substantial value or quantity (see pp. 3–4, *supra*) and therefore so notified the petitioners rather than issuing a complaint. Immediately upon receipt of petitioners' request for a hearing and assertion of the value and quantity of the items in dispute, however, the Judicial Officer determined that they were of substantial value and ordered the issuance of a complaint.

[35] The parties also stipulated that the determination in this proceeding would also govern another proceeding concerning *Fizeek* magazine (R. 81–82).

of the administrative record and 34 days after the magazines were initially deposited for mailing (R. 80).

With the exception of their request for a hearing, which was promptly granted,[36] petitioners made no objection at the administrative level to the procedure followed, and they took no exceptions.[37] Neither in the courts below nor here do they specify any way in which respondent's agents departed from the pertinent regulations, nor do they spell out any charges of irregularity or unfairness in the proceedings. Their attack is limited to the bald assertion that the procedure in this case amounted to an "ex parte administrative prior restraint" (Pet. Brief, p. 33) and were "no more than me arguing with myself over what I had already decided to do" (*ibid.*). The allegations of lack of a hearing and prejudgment implicit in these claims are wholly without foundation.

[36] There is, of course, no foundation for petitioners' assertion that they "forced the Post Office to hold a formal hearing * * * by obtaining a Temporary Restraining Order from the United States District Court for the District of Columbia" (Pet. Brief, p. 4). Petitioners' request for a hearing was received and granted on April 11, 1960, the same day on which petitioners sought and were granted, *ex parte*, a temporary restraining order which was stayed the following day at the request of respondent. Nothing in the record indicates that the Judicial Officer was motivated by, or was even aware of, the suit for judicial relief when he acted on the motion for a hearing.

[37] It would seem that the petitioners are therefore precluded from having any attack on the procedures employed considered by the courts. See *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37.

The only *ex parte* aspect of this proceeding was the General Counsel's decision to file a complaint, which was, of course, done in legitimate fulfillment of his prosecutorial function. Petitioner was granted a full adversary hearing, with all of the traditional rights to introduce evidence and to examine, confront and cross-examine witnesses. Petitioners do not, nor could they, cite any basis for suggesting that there was any prejudgment involved in the hearing they received. The authorized procedure for prosecution by the General Counsel and for adjudication by a hearing examiner (the necessity for which adjudication was waived by petitioners) and the Judicial Officer is in full compliance with the requirements of the Administrative Procedure Act for the separation of prosecutory and adjudicatory functions (5 U.S.C. 1004(c)) and for the conduct of hearings generally (5 U.S.C. 1006, 1007).[38] In the absence of the slightest evidence to the contrary, it must be assumed that these valid procedures were followed here.

B. THE POST OFFICE REGULATIONS APPLIED IN THIS CASE WERE AUTHORIZED AND REQUIRED BY ACT OF CONGRESS

As the foregoing section makes clear, the procedures for determining mailability, as authorized by the regulations and as they were implemented in this case, are eminently fair and unusually expeditious. Petitioner, however, contends that they constitute a "prior restraint," apparently because of the refusal of respondent's agents to convey in the mails or deliver

[38] Cf. Public Law 86-676, 74 Stat. 554 (1960).

petitioners' magazines while the proceeding to determine their mailability was pending.[39]

However, that refusal is clearly required by the unequivocal direction of the statute that obscene matter "* * * Is declared nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier" (18 U.S.C. 1461; see App. A, *infra*, p. 80). The regulations do nothing more than implement the congressional mandate that obscene materials shall not be carried in the mails. For if the magazines were conveyed through the mails and delivered while the administrative proceedings were going on, the proceedings would become moot. The time required to convey and deliver mail in this country is always less than the time required to hold a full and fair hearing with adequate notice. If, as petitioners apparently contend, the Post Office did not have authority to withhold material believed to be obscene from dispatch pending a decision on mailability, but were required to convey and deliver such material promptly, the Post Office could never comply with the express direction of Congress. The issue of the periodical in question would be delivered before it could be found obscene, and succeeding issues would

[39] We suggest that this issue is not properly in this case. It would have been properly presented had petitioners asserted it in the original suit they filed in April 1960, which was dismissed (see note 1, *supra*, p. 4). Petitioners took no appeal from that dismissal, and they did not institute the present action until a final administrative decision had been rendered (R. 66, 68). By that time, the question of power to withhold from the mails pending an administrative decision had been rendered moot.

have to be treated in the same way to avoid problems of prior restraint.[40] The barn could never be locked until after the horses were stolen. The Post Office Department would be required to violate the express statutory prohibition and to assist in the commission of the crime of mailing obscene matter.[41] That cannot be the law. If, as we believe, the section prohibiting the conveyance of obscene matter through the mails is constitutional,[42] it must require the Post Office to withhold matter deemed to be obscene from conveyance and delivery unless and until it is authoritatively determined not to be obscene.[43]

In our view, it is clear from the face of the statute that Congress intended the postal authorities to refuse to convey and deliver matter they believe to be obscene unless and until such matter is determined to be not obscene. However, in light of petitioners' apparent contention that the statute should somehow be construed to avoid that result (Pet. Brief, pp. 32–33), we show below that the legislative history, statutory framework and consistent administrative practice support the clear language and purpose of the statute, and require the respondent and his agents to refuse to convey or deliver obscene matter through the mails.

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[40] See pp. 67–69, *infra*.

[41] *Monart* v. *Christenberry*, 168 F. Supp. 654 (S.D.N.Y.).

[42] See pp. 65–79, *infra*.

[43] See also 39 U.S.C. 4001, formerly 39 U.S.C. 259, set forth in part at p. 61, *infra*.

1. The first statutory prohibition against admission of obscenity to the mails was Section 16 of the Act of March 3, 1865, 13 Stat. 507:

> SEC. 16. * * * [*N*]*o obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character, shall be admitted into the mails of the United States;* any person or persons who shall deposit or cause to be deposited, in any post-office or branch post-office of the United States, for mailing or for delivery, an obscene book, pamphlet, picture, print, or other publication, knowing the same to be of a vulgar and indecent character, shall be deemed guilty of a misdemeanor * * * [emphasis added].

Since the criminal offense was defined completely in the clause beginning "any person * * *," the italicized language would have been superfluous if only a criminal statute had been intended.

Moreover, the debates in the Senate show that in fact Congress designed the first clause to confer power on the Postmaster General to exclude obscenity from the mail. As reported in the Senate, the bill included the language quoted above and an additional clause, following the clause denying admission of obscenity to the mails, which provided "but all such obscene publications deposited in or received at any post office, or discovered in the mails, shall be seized and destroyed, or otherwise disposed of, as the Postmaster General shall direct" (Cong. Globe, 38th Cong., 2d Sess., 661). The provision was intended to give the postal officials authority to exclude obscene materials from the mails. As explained

by its sponsor (Senator Collamer), the bill had a two-fold effect (*ibid.*):

> The first part of it provides that if such [obscene] publications are in the mails the postmasters may take them out; and the latter part provides a penalty and a punishment and penalty for those who put them into the mails. * * *

Senator Reverdy Johnson of Maryland feared that the bill as reported would lead to the mailing of obscene matter in sealed envelopes, and that "the postmaster, whenever he suspects that the envelope contains anything which is obnoxious to objection [sic], will break the seal." He therefore moved to strike all the language of the bill except that defining the criminal offense. In response to this motion, Senator John Sherman of Ohio argued that "the legislative prohibition against carrying such matter *when it is known to the postmasters should be left.* Probably the second clause allowing him to open mail matter should be struck out * * *" (emphasis added). Senator Johnson thereupon modified his amendment to conform with Senator Sherman's suggestion, so that the bill as finally enacted permitted postmasters to refuse obscene matter admittance to the mails. (*Ibid.*)"

" The 1865 statute, 13 Stat. 504, 507, was reincorporated into Section 148 of the revised postal laws of 1872. 17 Stat. 302. In 1873, Section 148 was amended, 17 Stat. 599, and the same year was incorporated into the Revised Statutes, as Section 3893. R.S. 3893 was amended to substantially its present form in 1876, 19 Stat. 90, and was further amended in 1888, 25 Stat. 187. In 1909, it became Section 211 of the revised criminal code, 35 Stat. 1129, 1138. It was reenacted as Section 1461 of the criminal code (Title 18) in 1948, 62 Stat. 768, and amended again in 1955, 69 Stat. 183.

In 1879 Congress strengthened the prohibition against conveyance of obscenity through the mails by imposing upon each postmaster the duty of insuring that obscene materials and other matter declared nonmailable should not be delivered, even if it reached the post office of delivery. Act of March 3, 1879, 20 Stat. 360. This statute today reads (39 U.S.C. (Supp. II) 4001(b)[45]):

> * * * [*N*]*onmailable matter which reaches the office of delivery,* or which may be seized or detained for violation of law, *shall be disposed of as the Postmaster General directs.* [Emphasis added.]

Thus, between 1865 and 1880 Congress established a comprehensive statutory scheme directed to the postal authorities, requiring them to refuse to convey obscene matter through the mails or to deliver it. In recent years, Congress has given even greater authority to the postal officials to insure that the mails do not become a vehicle for the conveyance of obscenity.[46]

2. The congressional prohibition against the transmission of obscene materials in the mails is part of a consistent statutory pattern for excluding from the mails all matter that Congress has made it a crime

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[45] Its form was modified recently in the act codifying Title 39, P.L. 86–682, 74 Stat. 578 (Sept. 2, 1960).

[46] *E.g.*, 64 Stat. 451, 39 U.S.C. (Supp. II) 4006 (S. Rep. No. 2179, 81st Cong., 2d Sess.); 69 Stat. 183, 18 U.S.C. 1461, 1465 (S. Rep. No. 113, 84th Cong., 1st Sess.); 70 Stat. 699, 39 U.S.C. (Supp. II) 4007 (S. Rep. No. 2234, 84th Cong., 2d Sess.); 72 Stat. 962, 18 U.S.C. 1461, 1462 (S. Rep. No. 1839, and H. (Conf.) Rep. No. 2624, 85th Cong., 2d Sess.).

to mail. Explosives, poisons, disease germs, and intoxicating liquors are nonmailable (18 U.S.C. 1716); so are writings advocating treason, insurrection, or forcible resistance to the law (18 U.S.C. 1717); writings inciting to arson, murder, or assassination (18 U.S.C. 1715); foreign divorce information (18 U.S.C. 1714); and many other types of materials (39 U.S.C. (Supp. II) 4001(a)). It cannot be argued that the unequivocal declaration of the nonmailability of such things as explosives nevertheless permits them to be circulated in the mails until there can be a full-dress administrative proceeding to establish their objectionable character, and there is no reason for construing the nonmailability provision differently for obscenity than for the other matters declared to be nonmailable.[47] As Mr. Justice Brandeis observed in *Milwaukee Publishing Co.* v. *Burleson,* 255 U.S. 407, 418 (dissenting opinion):

> The scope of the Postmaster General's alleged authority is confessedly the same whether the reason for the nonmailable quality of the matter inserted in a newspaper is that it violates the Espionage Act, or the copyright laws, or that it is part of a scheme to defraud, or concerns lotteries, or is indecent, or is in any other respect matter which Congress has declared shall not be admitted to the mails.

We submit that the mandate from Congress is clear: if the matter is non-mailable, then it must be excluded from the mails; and from this it must inevitably follow that if there is doubt as to the mailability of the

[47] See 39 U.S.C. (Supp. II) 4001(a).

matter, it must be withheld from dispatch until a decision as to mailability can be reached, with due regard for both the purpose of Congress and the procedural rights of the sender.

3. The consistent administrative practice of the Post Office Department has been to refuse to carry matter deemed to be obscene unless and until such matter has been authoritatively determined to be mailable. The earliest postal regulations placed the burden of excluding obscenity and other non-mailable matter upon the local postmaster. See, *e.g.*, Postal Laws and Regulations, 1873 ed., Section 88;[48] Postal Laws and Regulations, 1887 ed., Section 527;[49] Postal Laws and Regulations, 1893 ed., Section 335;[50] 1 Ops. Asst. Atty. Gen. for the Post Office Dept. 41 (1873); 4 Ops. Asst. Atty. Gen. for the Post Office Dept. 389, 391 (1907). The present practice of referring questions as to the mailability of matter deemed to be obscene to a central authority was adopted in 1902.

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[48] Section 88, "All books, pamphlets, circulars, prints, &c., of an obscene, vulgar, or indecent character; * * * must be withdrawn from the mails by postmasters at either the office of mailing or the office of delivery."

[49] Section 527. "Postmasters are required to exclude from the mails all unmailable matter; but they are specially warned that they have no right to detain first class matter upon the mere suspicion that it contains anything forbidden to be sent in the mails."

"When matter manifestly obscene, or circulars concerning lotteries, are deposited for mailing, the postmaster should withdraw them, and send them with a full statement of the facts within his knowledge to the Dead-Letter Office. * * *"

[50] Section 335. "Postmasters Are Responsible for Admission of Improper Matter, and will exercise great care to exclude whatever is manifestly unmailable. * * *"

Postal Laws and Regulations, 1902 ed., Section 497. Postmasters continued to be responsible in the first instance for excluding obscenity offered for dispatch. Postal Laws and Regulations, 1902 ed., Section 573. The duty not to convey such matter through the mails while awaiting a determination as to mailability was expressly recognized in an opinion rendered shortly thereafter by the legal advisor to the Post Office Department. 4 Ops. Asst. Atty. Gen. for Post Office Dept. 741, 742 (1908).

This interpretation has been consistently followed by the Post Office Department under the various amendments and revisions of the basic prohibition against the conveyance of obscene matter in the mails.[51] That this administrative practice accords with the aim of Congress has been recognized in debate on the floor of the House (*e.g.*, 8 Cong. Rec. 697), in hearings before committees of Congress (*e.g.*, Hearings before the House Post Office and Civil Service Committee on H.R. 569, 83rd Cong., 2d Sess., pp. 32–33), and in committee reports (*e.g.*, S. Rep. No. 747, 52d Cong., 1st Sess.).

Since this administrative interpretation was adopted when the statute was new, was instituted by those charged with the responsibility of enforcing the law, has been consistently followed, and has the clear approval of Congress, it should not be overturned except for the most compelling reasons. See *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315; *United States* v. *American Trucking Associations*, 310 U.S. 534, 549; *Federal Housing Authority* v. *The Dar-*

[51] See notes 44 and 46, *supra*, pp. 60, 61.

lington, 358 U.S. 84, 90; *Federal Trade Commission* v. *Mandel Brothers,* 359 U.S. 385, 391. Not only are those reasons absent here, but in our view the administrative interpretation is the one required by the plain language and manifest purpose of the statute.

C. THE STATUTORY PROHIBITION AGAINST CONVEYING OBSCENE MATTER THROUGH THE MAILS DOES NOT IMPOSE AN UNCONSTITUTIONAL PREVIOUS RESTRAINT ON SPEECH OR THE PRESS

Petitioners have not directly challenged the constitutionality of the clause in 18 U.S.C. 1461 which forbids the conveyance through the mails and the delivery of obscene matter. Although they attack the procedures followed by respondent's agents as unconstitutional, they refer to the statute as one which "raises doubts of constitutionality" and is "of doubtful Constitutional validity" (Pet. Brief, pp. 32, 33). The same absence of a direct challenge is apparent in the petition for certiorari (Pet. 7–8). It is at least questionable whether the constitutionality of the statute was fairly encompassed in the questions presented in the petition. See the Revised Rules of this Court, Rule 15–1(c)(1).

Two other facts indicate that petitioners may have failed to preserve their rights to challenge the constitutionality of the statute itself. At the administrative hearing they did not in any way challenge the procedure followed by respondent.[52] More significant, perhaps, is the manner in which the case arose. Although petitioners sought an injunction requiring the conveyance of their magazines through

[52] See p. 55, *supra.*

the mails, they did not seek the three-judge court normally required by 28 U.S.C. 2284 in cases in which the challenge to administrative action is based upon the unconstitutionality of the statute itself, rather than of some administrative ruling. For these reasons, the Court may wish to refrain from deciding the constitutionality of the clause of 18 U.S.C. 1461 prohibiting the carrying of obscene matter through the mail."[33] For the remainder of this brief, however, we assume that the constitutional question has been properly preserved and presented to the Court.

In *Roth* v. *United States*, 354 U.S. 476, this Court determined that Congress has the authority, under the postal power delegated to it by Art. I, § 8, Cl. 7 of the Constitution, to prohibit the mailing of obscene matter and to prescribe appropriate punishment therefor. See also *Public Clearing House* v. *Coyne*, 194 U.S. 497, 506–08. We submit that the power of Congress to authorize the withholding of matter that may be obscene pending determination of its mailability is equally clear, and that it is beyond constitutional challenge because (1) such withholding does not constitute a previous restraint for the reason that the matter has already been published and can be distributed by means other than the mails; (2) whatever

[33] The long standing practice of this Court is, of course, to avoid the decision of delicate constitutional questions where possible. *E.g.*, *Greene* v. *McElroy*, 360 U.S. 474, 492–493; *United States* v. *UAW-CIO*, 352 U.S. 567; *United States* v. *C.I.O.*, 335 U.S. 106; *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 345–346 (concurring opinion of Brandeis, J.), and cases cited.

disability the withholding imposes is reasonable in relation to the overriding public interest, expressed by Act of Congress, in preventing the dissemination of obscenity; and (3) the constitutionality of the statute is supported by its unchallenged acceptance for almost one hundred years and by the rulings of this Court.

1. The First Amendment to the Constitution prohibits laws that abridge freedom of speech and freedom of the press. Although the Amendment makes no specific reference to prior or previous restraint, the conception of those freedoms held by the framers of the First Amendment was based upon the historic struggle in England directed against the system of censorship by licensing. Blackstone asserted that liberty of the press "consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." 4 Bl. Comm. 151–152. Madison may have been of the same view. See Madison's Report on the Virginia Resolutions, 4 Elliot's Debates 546. This Court has stated that the "main purpose" of the freedom of speech and of the press clauses was to prevent previous restraints. *Patterson* v. *Colorado*, 205 U.S. 454, 462. Of course, it seems clear that the First Amendment also prohibits subsequent punishment for constitutionally protected utterances.[54] Nor is the protection as to previous restraint absolutely unlimited.[55] Neverthe-

[54] *E.g.*, *Butler* v. *Michigan*, 352 U.S. 380; *Smith* v. *California*, 361 U.S. 147. See 2 Cooley, *Constutional Limitations* (8th ed.) 815.

[55] *E.g.*, *Near* v. *Minnesota*, 283 U.S. 697, 715–716; *Times Film Corp.* v. *Chicago*, 365 U.S. 43; *Schenck* v. *United States*, 249 U.S. 47; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 439; *Dennis* v. *United States*, 341 U.S. 494.

less, the distinction between previous restraint and subsequent punishment apparently retains vitality, in the sense that a previous restraint is to be scrutinized more carefully to see whether it offends against the historic conception of the freedoms of speech and of the press embodied in the First Amendment.

A restraint is previous, rather than subsequent, when, like the hated power of the licensor in Sixteenth and early Seventeenth-Century England, it prevents the publication of material. 4 Bl. Comm. 151–152.[56] Thus, in *Near* v. *Minnesota*, 283 U.S. 697, a procedure which placed a newspaper under injunction for future issues as well as those already published was held to be "of the essence of censorship," an unconstitutional previous restraint. 283 U.S. at 713, 710–720. By contrast, in *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, the procedure established by a New York statute for an injunction against the sale and distribution of obscene matter was upheld as constitutional, and not an illegal restraint (354 U.S. at 442):

> Criminal enforcement and the proceeding under § 22-a interfere with a book's solicitation of the public precisely at the same stage. In each situation the law moves after publication; the book need not in either case have yet passed into the hands of the public. * * *

[56] Blackstone said: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity."

The Court distinguished *Near* v. *Minnesota*, *supra*, on the ground, *inter alia*, that unlike the Minnesota statute the New York procedure "studiously withholds restraint upon matters not already published" 354 U.S. at 445.

The rationale behind this important distinction is not difficult to perceive. The premise of the First Amendment protection is that man is not to be inhibited in the development of his ideas. The process through which the author goes in articulating his ideas to the point where he is prepared to share them, either by speech or the written word, with the world at large is often the most important phase of their maturation. Hence, he must not ordinarily be stopped short of what marks the terminal point in their development: publication. This, too, for the additional and equally important reason that it is only upon or after publication that even the most obnoxious products of the minds of men are capable of working sufficient public harm to warrant their control.

Like the procedure in the *Kingsley Books* case, *supra*, and unlike that in *Near* v. *Minnesota*, the statute here (18 U.S.C. 1461) affects only matter that has already been printed and published. The order of respondent likewise goes only to the issues of petitioners' magazines that have been printed and published (R. 88). Since the statute prohibits only the transmission of obscene matter, it could not be construed to apply to future issues.

In determining whether a procedure constitutes an unlawful previous restraint, the governing consideration is "the operation and effect of the statute in sub-

stance." *Near* v. *Minnesota*, 283 U.S. 697, 713; *Kingsley Books* v. *Brown*, 354 U.S. 436, 441–442; see also *Marcus* v. *Search Warrant*, 367 U.S. 717, 736–737. Analyzed in terms of substance, rather than form, it is clear that the procedure prescribed by 18 U.S.C. 1461 does not amount to such a previous restraint. As noted above, the refusal to carry the matter through the mails is made only after publication. And the refusal to carry the materials does not constitute a full "restraint." For example, that refusal imposes little disability in the intra-state circulation and distribution of the material by the publisher, and it leaves him free to circulate and distribute the material among the States by other means of transportation, subject of course to the possibility of criminal prosecution,[11] which is present regardless of respondent's refusal. The restraint imposed by this provision is considerably less drastic than that involved in the *in rem* proceedings authorized by the Customs Act, 19 U.S.C. 1305(a). Yet the constitutionality of that provision, which has been in effect since 1842 (5 Stat. 566–567), has never to our knowledge been questioned.

The limited effect of a postal refusal to convey matter through the mails is demonstrated by the record in this case. Of the claimed circulation of 25,000 copies for each issue of petitioners' magazines, less than half (12,000) were distributed through the mails (R. 66–67). The remainder, presumably those sold within the District of Columbia or distributed by

[11] 18 U.S.C. 1462, 1463, 1465.

carrier, were unaffected by any decision as to the mailability of the magazines. And of the 12,000 copies of each magazine distributed through the mails, fewer than 1,000 were mailed to individual subscribers, with the remainder sent in lots to distributors (R. 71). And, of course, as to the 375 copies of petitioners' magazines that were actually denied access to the use of the mails, petitioner was free to withdraw them from the post office, and to transport them by some other means [58] (see Pet. Brief, p. 34; 39 C.F.R. 203.5, App. A, *infra*, p. 82).

Respondent's refusal to convey the magazines through the mails imposed much less of an actual restraint than that upheld in *Kingsley Books* v. *Brown*, 354 U.S. 436. In that case the statutory procedure, which this Court upheld, permitted an injunction *pendente lite* against the sale and distribution of the articles in issue. Under the statute in this case, petitioners were free from the hazards of contempt proceedings to continue to circulate, distribute and sell their magazines both intrastate and interstate while the determination as to obscenity was being made. Indeed, insofar as appears from the record, petitioners could in the interim have withdrawn almost all of the copies of the issues they had deposited, and still obtain a ruling as to mailability. At most, then, petitioners suffered a minor economic loss as a result of the refusal to carry their magazines through the mails while the proceedings were pend-

[58] Subject, of course, to the possibility of criminal prosecution.

ing. There was, in short, no full or prohibitory restraint on the circulation of the magazines.[59]

2. At least since *Roth* v. *United States*, 354 U.S. 476, 485, it has been settled that obscenity, like epithets, libelous utterances and fraudulent representations, is not speech within the meaning and protection of the First Amendment.[60] It follows that even a previous restraint does not violate that Amendment if it is directed to obscene matter. *Times Film Corp.* v. *Chicago*, 365 U.S. 43. The obscenity of the particular materials which respondent refused to convey through the mails does not end the matter, however. A statute may be deemed an abridgement of free speech if, in its attempt to suppress constitutionally unprotected utterances such as obscenity, it inhibits the free flow of non-obscene literature by failing to provide adequate safeguards for the constitutionally protected material. *Smith* v. *California*, 361 U.S. 147; *Marcus* v. *Search Warrant*, 367 U.S. 717.

The statute in issue here has no such infirmity. As supplemented by the regulations, the Act provides for a speedy determination as to the obscenity *vel*

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[59] Petitioners' contention that the length of the proceeding to determine mailability renders monthly magazines obsolete (Pet. Brief, p. 34) has no applicability to this case, at least. The magazines petitioners deposited for mailing on March 25 were the March and May issues of one magazine, the April issue of another and the May issue of the third (Exs. 1–4); apparently petitioners' readers make few demands with respect to currency. Moreover, there was nothing pertaining to current events in any of the magazines; indeed, the only thing that could possibly date the magazines was the designation of month and year on the cover.

[60] See p. 21, incl. note 8, *supra*.

non of each item presented for mailing (see pp. 52–56, *infra*). The initial decision as to mailability is made by persons trained in the law and familiar with the decisions of this Court and the lower courts (39 C.F.R. 203.2). Contrast *Marcus* v. *Search Warrant, supra,* 367 U.S. at 732, 735. The administrative determination is rendered by an impartial adjudicatory officer after a full hearing with ample opportunity for the presentation of expert and lay testimony and for confrontation and cross-examination. There are strict time limits governing each stage of the administrative proceedings, which are conducted with the utmost speed compatible with the requirements of notice and fair hearing (39 C.F.R. 203.2, .4, .6, .8, .10, .11, and .13). Contrast *Marcus* v. *Search Warrant, supra,* 367 U.S. at 735, 737. At any time during the proceedings, the mailer is free to distribute other copies of his publication and may even withdraw the matter submitted for mailing in order to distribute it in other ways. The order is limited to the specific item found to be non-mailable. Contrast *Marcus* v. *Search Warrant, supra,* 367 U.S. at 735, 736. Furthermore, any error made at the administrative level is subject to correction by the courts. 5 U.S.C. 1009.[51]

[51] It should be noted that, as the definition of obscenity in 18 U.S.C. 1461 is the same for both the civil and criminal provisions, the postal officials have the authority to exclude from the mails only material that would sustain a conviction under the criminal provisions of that statute for their knowing deposit in the mails. As the record in this case shows (see pp. 36*ff*, 52–56, *supra*), the statute and regulatory procedure under 18 U.S.C. 1461 allow for judging the materials in context, giving due consideration to the intent of the parties. In this respect,

Moreover, there is no federal constitutional infirmity in 18 U.S.C. 1461 in the fact that the determination of obscenity is made by an administrative official rather than by a jury. No criminal prosecution is involved. There is no substitution of punishment by contempt for punishment by jury trial. Accordingly, there is no question of a right to a trial by jury under the Sixth Amendment. Nor is there any suit "at common law" calling for a jury under the Seventh Amendment.[62] At stake is only the refusal, based upon an express statutory mandate, to transmit obscenity through the mail. That refusal must in the nature of things be made first by an administrative official, subject to review by the courts.[63] The Constitution does not provide otherwise.[64]

We submit that this statute and this procedure are entirely constitutional, judged by the prior decisions of this Court, notably the *Marcus* case, *supra*, and the *Kingsley Books* case, see pp. 71, 73, *supra*. The minor disabilities they impose upon would-be users of the mails (and, as we have shown, pp. 70–72, *supra*, those disabilities are slight) are reasonable even when considered alone, but are especially so in relation to the

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the statute and procedure here are more clearly constitutional than those sustained by this Court in *Kingsley Books* v. *Brown*, 354 U.S. 436. Compare 354 U.S. at 445–47 (dissenting opinions of Warren, C. J., and Douglas, J.).

[62] Petitioners have never asked for a trial by jury, and make no assertion here of the right to a jury determination.

[63] The question of the scope of judicial review is not presented by the record here. See *supra*, p. 38.

[64] *Glanzman* v. *Schaffer*, 252 F. 2d 333 (C.A. 2), judgment vacated with orders to dismiss as abated, 357 U.S. 347.

legitimate public interest in prohibiting the distribution of obscene materials. It is not too much to ask of those who would distribute matter that is at best on the .derline of obscenity that they undergo a relatively short delay in the use of the mails (although they are free to use other methods of distribution) in order to obtain a definitive ruling as to the mailability of the challenged matter.

3. As we have noted (see pp. 59–61, *supra*), the civil provisions of 18 U.S.C. 1461 involved here are as venerable as the criminal provisions of that section, whose constitutionality was upheld in *Roth* v. *United States*, 354 U.S. 476. First enacted in 1865, they have remained in force continuously since that time. Although the postal authorities consistently refused to convey obscene matter in the mails, until recent years the constitutionality of the statute was always assumed and never challenged.

A succession of decisions by this Court upholding the congressional authority to exclude matter from the mails confirmed the general understanding. See, *e.g.*, *Ex parte Jackson*, 96 U.S. 727 (circular concerning lotteries); *In re Rapier*, 143 U.S. 110; *Horner* v. *United States*, 143 U.S. 207 (lottery circular); *Public Clearing House* v. *Coyne*, 194 U.S. 497 (fraud order). In the last-named case, the Court noted (194 U.S. at 508):

> For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The consti-

> tutionality of this law we believe has never been attacked * * *.

By the time of this Court's decision in *Milwaukee Publishing Co.* v. *Burleson*, 255 U.S. 407, the law seemed so well established that the Court referred to the congressional authority over the mails as "practically plenary." 255 U.S. at 411. Mr. Justice Brandeis, while dissenting from the Court's decision, referred no fewer than four times in his opinion to the authority of Congress to exclude obscene and immoral matter from the mail. 255 U.S. at 418, 421, 422, 430. He pointed out (255 U.S. at 421):

> As a matter of administration the Postmaster General, through his subordinates, rejects matter offered for mailing, or removes matter already in the mail, which in his judgment is unmailable. *The existence in the Postmaster General of the power to do this cannot be doubted.* The only question which can arise is whether in the individual case the power has been illegally exercised. * * * [Emphasis added.]

In 1947, a renowned scholar, noted for his championship of the freedoms of speech and of the press, appraised the constitutionality of 18 U.S.C. 1461 in the following terms (Chafee, *Government and Mass Communications*, p. 282):

> The effect of the First Amendment and freedom of the press upon the administrative mechanism of the Post Office is more important practically than their effect on the postal power of Congress. Questions of the uncon-

> stitutionality of legislation are somewhat remote from reality, because the existing postal statutes, if properly construed, seem to fall within the valid powers of Congress. * * *

This Court's reaffirmation, in *Donaldson* v. *Read Magazine*, 333 U.S. 178, of the congressional authority to deny use of the mails to those who use them to conduct fraudulent enterprises supported the general view of the constitutionality of 18 U.S.C. 1461.[65] It is difficult, of course, to see why the "merchants of obscenity" who pander to the prurient are any more entitled to use the mails to further the conduct of their business than those who would use the mails to conduct fraudulent businesses. See *Milwaukee Publishing Co.* v. *Burleson, supra*, 255 U.S. at 418 (dissenting opinion of Brandeis, J.).

Not until 1949 was the constitutionality of the administrative provisions of 18 U.S.C. 1461 seriously questioned by any judicial authority.[66] *Roth* v. *Goldman*, 172 F. 2d 788, 790-91 (C.A. 2) (concurring opin-

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[65] Although in *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, the Court ruled that Congress had granted only limited authority to the Postmaster General to refuse second-class mailing permits, no doubt was cast upon the congressional authority to exclude obscene matter from the mails.

[66] In *Walker* v. *Popenoe*, 149 F. 2d 511 (C.A.D.C.), Judge Arnold expressed doubt as to the constitutionality of barring a pamphlet from the mails, without a hearing, on the ground of obscenity; it is not clear whether his doubts extended to a refusal to carry pending a prompt hearing. See 149 F. 2d at 513-14.

ion), certiorari denied, 337 U.S. 939 (~~concurring opinion~~). And even Judge Frank, who raised the constitutional doubts,[67] concurred in the decision upholding the refusal of the postal authorities to convey the obscene matter through the mails. Thus, the constitutionality of the provisions of the statute forbidding transmission of obscene matter through the mails appears to have been universally conceded for the first 84 years of its existence.

Since that time, the authority of the postal officials, based upon 18 U.S.C. 1461, has been sustained by every court in which that authority has been challenged. *Sunshine Book Co.* v. *Summerfield,* 249 F. 2d 114 (C.A.D.C.), reversed on other grounds, 355 U.S. 372; *One, Inc.* v. *Olesen,* 241 F. 2d 722 (C.A. 9), reversed on other grounds, 355 U.S. 371; *Monart* v. *Christenberry,* 168 F. Supp. 654 (S.D.N.Y.); *Glanzman* v. *Christenberry,* 175 F. Supp. 485 (S.D.N.Y.); *Poss* v. *Christenberry,* 179 F. 2d 411 (S.D.N.Y.); accord, *Klaw* v. *Schaffer,* 251 F. 2d 615 (C.A. 2), ordered dismissed as abated, 357 U.S. 346;[68] *Glanzman* v. *Schaffer,* 252 F.

[67] The doubts were addressed primarily, but not exclusively, to the standards for determining obscenity, the test on judicial review, and the necessity for showing a clear and present danger that the obscenity would result in unlawful conduct. 172 F. 2d at 790–798.

[68] *Klaw* v. *Schaffer, supra,* involved the validity of a stop order under 39 U.S.C. 259a (now 39 U.S.C. Supp. II 4006). The District of Columbia Circuit had held similar stop orders too broad. *Summerfield* v. *Sunshine Book Co.,* 221 F. 2d 42, certiorari denied, 349 U.S. 921; *Tourlanes Publishing Co.* v. *Summerfield,* 231 F. 2d 773, certiorari denied, 352 U.S. 912; *Oakley* v. *Summerfield,* 231 F. 2d 775, certiorari denied, *sub nom. Summerfield* v. *Tourlanes Publishing Co.,* 352 U.S. 912. The Post Office Department later provided by regulation for a narrower form of stop order. 23 Fed. Reg. 3740. *Glanzman* v. *Schaffer, supra,* also involved a stop order under 39 U.S.C. 259a.

2d 333 (C.A. 2), judgment vacated, 357 U.S. 347. The unanimity of judicial opinion for over four score years before any question was raised, and the uniform decisions of the lower federal courts since that time, provide persuasive support for the constitutionality of the statutory provisions excluding obscene matter from the mails pending a hearing as to its mailability and for the view that Congress can constitutionally forbid the use of the postal service as an instrument for the commission of the crime of transmitting obscene matter through the mails. *Monart* v. *Christenberry, supra.*

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
J. WILLIAM DOOLITTLE,
Assistant to the Solicitor General.
JOHN G. LAUGHLIN, JR.,
DAVID L. ROSE,
Attorneys.

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APPENDIX A

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1461 of Title 18, U.S.C., provides in pertinent part:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> * * * * *
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * *
>
> * * * * *
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing

thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

* * * * *

Regulations of the Post Office Department, Rules of Practice and Proceedings, entitled Hearings on Mailability, 39 C.F.R. 203 (1961 Supp.), provide:

§ 203.1 *Limitation.*

The rules shall be applicable only to cases where the matter offered for mailing shall be of substantial value or quantity. The initial determination of this question by the General Counsel may be appealed to the Judicial Officer.

§ 203.2 *Initiation.*

Upon receipt of mail matter of doubtful mailability under the provisions of 18 U.S.C. 1302, 1461, 1463, 1717, or 1718 submitted by a postmaster pursuant to sec. 331.6 of the Postal Manual, the General Counsel shall: (a) file a complaint with the Docket Clerk of the Post Office Department or (b) instruct the postmaster to accept such matter for mailing.

§ 203.3 *Complaint.*

The complaint shall: (a) State statutory and or regulatory authority for withholding the matter from the mails; (b) specify the character or content of the matter which the complainant believes to be non-mailable; and (c) request the issuance of a notice of hearing by the Docket Clerk.

§ 203.4 *Notice of hearing; service.*

Upon receipt of the complaint the Docket Clerk shall issue a notice of hearing. The notice shall set the time and place for the hear-

ing and assign on rotation as far as practicable, a Hearing Examiner qualified pursuant to section 11 of the Administrative Procedure Act. The date set for the hearing shall be within ten days of the date of the filing of the complaint. The notice, together with copies of the complaint and these rules, shall be sent promptly to the Postmaster at the place of mailing to be served upon the mailer or his agent. A receipt therefor shall be obtained and forwarded immediately to the Docket Clerk. If personal service cannot be made, the notice of hearing shall be deposited in the mails for delivery in the regular course which shall constitute valid service. A report of such delivery shall be promptly forwarded to the Docket Clerk.

§ 203.5 *Compromise and informal dispositions.*

The mailer may request a conference with the complainant to consider informal disposition of any question of mailability or apply to the complainant for the withdrawal of the matter from the mails. When such a request is received, the scheduled hearing date will be postponed for such period of time as may be necessary but in no event longer than five days unless specifically requested by the mailer. If no agreement is reached, the proceeding shall promptly be re-scheduled for hearing.

§ 203.6 *Answer.*

The mailer may file an answer to the complaint and appear in person or by counsel at the hearing. The answer shall contain a reply to each allegation in the complaint and shall be filed in triplicate with the Docket Clerk in Room 5115, Post Office Department, Washington 25, D.C., at least three days prior to the date set for the hearing. Each allegation not answered shall be deemed admitted.

§ 203.7 *Default.*

If no answer to the complaint is filed, the mailer shall be deemed in default and the Judicial Officer shall instruct the postmaster of the disposition to be made of the matter in accordance with § 203.11. If the mailer files an answer but fails to appear at the hearing, the hearing examiner shall receive the evidence of the complainant and render an initial decision pursuant to § 203.10.

§ 203.8 *Hearing.*

Unless otherwise ordered by the Hearing Examiner, the hearing shall be held in Room 5241, Post Office Department, 12th and Pennsylvania Avenue NW., Washington 25, D.C., on the date set in the notice.

§ 203.9 *Proposed findings of fact.*

Either party may submit proposed findings of fact and conclusions of law orally or in writing at the conclusion of the hearing, unless the mailer requests an extension, which may be granted for a reasonable time.

§ 203.10 *Initial decision.*

Unless given orally at the conclusion of the hearing, the Hearing Examiner shall render an initial decision within five days of the conclusion of the hearing or of the receipt of the proposed findings if not submitted at the hearing. The initial decision shall become the departmental decision if an appeal is not perfected.

§ 203.11. *Appeal.*

Either party may file exceptions in a brief on appeal to the Judicial Officer within five days after the initial decision unless additional time is requested by the mailer. A reply brief may be filed within five days after the receipt of the appeal brief by the Docket Clerk.

§ 203.12 *Departmental decision.*

The Judicial Officer shall render a departmental decision or refer the matter to the Postmaster General for decision. The decision shall be served upon the parties and the postmaster.

§ 203.13 *Expedition.*

For the purposes of expedition the parties may, with the concurrence of the Judicial Officer, agree to waive any of these procedures.

§ 203.14 *Disposition.*

Matter found to be nonmailable shall be held at the post office where detained for a period of fifteen days, unless extended by the Judicial Officer, from the date of the departmental decision. During that time the mailer may make application for the withdrawal of the matter. The Judicial Officer shall order the matter returned to the mailer or otherwise disposed of in accordance with 39 U.S.C. 258.

The Regulations of the Post Office Department on Non-mailable matter, 39 C.F.R. (1961 Supp.) 14, provide in pertinent part:

§ 14.4 *Obscene and indecent matter.*

(a) *Lewd or filthy matter.* Obscene, lewd, lascivious, or filthy publications or writings, or mail containing information concerning where, how, or from whom such may be obtained, and matter which is otherwise mailable but which has on its wrapper or envelope any indecent, lewd, lascivious, or obscene writing or printing. Any mail containing any filthy, vile, or indecent thing.

§ 14.9 *Opinions on mailability.*

Postmasters and other employees at post offices shall not give opinions to the public concerning the mailability of matter under §§ 14.4,

14.5, 14.6, 14.7, 14.8 and §§ 15.5 and 15.6 of this chapter. When there is doubt as to the mailability of any such matter, the postmaster shall withhold it from dispatch or delivery and a sample or a complete statement of the facts shall be submitted to the General Counsel for instructions.

APPENDIX B

POST OFFICE DEPARTMENT
WASHINGTON, D.C.

In the Matters Concerning
MANUAL ENTERPRISES, INC., ET AL., and FIZEEK ENTERPRISES, INC.

P.O.D. Docket No. 1/246. P.O.D. Docket No. 1/235

MAILERS PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of fact:

1. That all of the magazines in evidence, exhibits one through eleven, do not have as their dominant theme an appeal to the prurient interest of the average person, applying contemporary community standards.

2. That all of the magazines in evidence, exhibits one through eleven, could and would appeal to the prurient interest of particularly susceptible persons such as homosexuals.

3. The publishers of each of the magazines in evidence, exhibits one through eleven, had no personal knowledge of the material sold by the advertisers whose advertisements are carried in all of the magazines in evidence, exhibits one through eleven.

Conclusions of law:

1. The magazines in evidence, exhibits one through eleven, by content are not obscene and are mailable.

2. The magazines in evidence, exhibits one through eleven, do not contain advertisements as to where, or how, or from whom obscene material may be obtained and are mailable.

Respectfully submitted.

STANLEY M. DIETZ,
Attorney for Mailers.

U.S. GOVERNMENT PRINTING OFFICE 1967